In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF BALTIMORE.
No. 242.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. The case has been twice in that court. See *American Bonding Company* v. *United States,* 167 Fed. 910 (Feb. 1, 1909); *Axman* v. *United States, id.,* 922; and *United States* v. *Axman et al.,* 193 Fed. 644 (Feb. 20, 1912).

The action was brought in the Circuit Court of the United States for the Northern District of California to recover from one Rudolph Axman

and the American Bonding Company of Baltimore as his surety damages sustained by the United States by reason of Axman's failure to carry out a dredging contract.

By the Rivers and Harbors Act of June 13, 1902, 32 Stat. 331, 346, Congress made provision for "improving San Pablo Bay, California, by constructing a channel between the Straits of Carquines and the Golden Gate, off Point Pinole, Point Wilson, and Lone Tree Point, three hundred feet in width and thirty feet in depth" (R. 49), and on the 21st of November, 1902, Axman entered into the contract in suit (R. 62)[1] with W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, representing the United States. It was agreed, in brief, that he would do such dredging as might be required to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, and that he would deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the engineer officer in charge, and impound the material behind bulkheads or dykes of suitable construction, subject to approval by such engineer officer, the same to be built and maintained by the contractor, and that he would excavate a minimum of 100,000 cubic yards per month, prosecute the work with faithful-

[1] The contract also appears in evidence at R. 84.

ness and energy and complete it within 28 months (R. 50–65). The American Bonding Company of Baltimore became his surety in the penalty of $50,000 (R. 117).

Axman commenced the work within 60 days after the contract was signed and continued to work intermittently until the 24th of December, 1903. During this period he took out at no time the minimum excavation of 100,000 cubic yards per month, and at the end of nine months he had removed less than 200,000 yards out of an estimated total of 2,721,000 yards.

On September 18, 1903, Heuer wrote to Axman complaining of his lack of diligence (R. 137), and Axman answered with numerous excuses and promises of expedition (R. 138). No improvement, however, resulted.

Thereupon Heuer exercised the right given him by the fourth clause of the contract (R. 62) to annul it upon the failure of Axman to prosecute faithfully and diligently the work, and gave to Axman and the Bonding Company on December 24, 1903, written notice to that effect (R. 90–91).

Heuer then proceeded to advertise for bids for the completion of the work. During the life of the contract Axman had complained of the difficulty of depositing spoil in shallow water at the point named in the specifications, and had asked leave to deposit it in deep water at a point known as "The Sisters," which request had been refused.

The first advertisement for reletting contemplated a deposit at the original point, but all the bids which were received under it were in the opinion of Heuer excessive. He thereupon readvertised and invited bids upon the basis of depositing the spoil at the shallow point and also upon the basis of depositing it in deep water at "The Sisters." The latter proved to be the spot preferred by the bidders and led to the lowest bid. The contract was accordingly relet without further change, except as to price, to the North American Dredging Company, which proceeded with the work to completion.

Notwithstanding the more favorable terms as to the place of depositing the spoil, the Government paid $65,000 more for the actual excavation by the North American Dredging Company under the last-mentioned contract than it would have paid under the Axman contract (R. 123), and sued to recover this loss.

Upon the first trial judgment was rendered in favor of the United States for the difference between the excess cost of completion and the percentages reserved from Axman under his contract; but this was reversed by the Circuit Court of Appeals and the case remanded for a new trial. This was had, and the court below, following as in duty bound the opinion of the Circuit Court of Appeals in the premises, refused to admit in evidence the contract entered into with the North American Dredging Company and the testimony of sundry witnesses to the effect that

the work had been relet at a fair rate, and that the relative cost of performing it was lower, by reason of the change as to the dumping ground, than that of the Axman contract; and, in logical conformity with this ruling, the court instructed the jury to find in favor of the defendants, which was accordingly done and judgment was so entered. This judgment the Circuit Court of Appeals affirmed.

The specifications attached to the original and the relet contracts which give rise to the question here involved are respectively as follows:

> *Original.*—36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the engineer officer in charge, and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract. (R. 54.)
>
> *Relet.*—36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet and either
>
> (a) To deposit the spoil as near the south shore as practicable, within lines drawn be-

tween Point Pinole and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract, or

(b) To deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide.

Bids will be received for either place of deposit, but will not be considered for any other place of deposit than those specified, and bidders must distinctly state in their bid in which place they propose to deposit the spoil. The right is reserved to award the contract, irrespective of price, for such place of deposit as may be considered most advantageous to the United States. (R. 98.)

ASSIGNMENTS OF ERROR.

It is not necessary to set out *in extenso* the assignments of error. They appear at page 167 of the record and present, in effect, the single question, Did the Government, by extending to the second contractor the right to dump in deep water, release both principal and surety under the original contract?

ARGUMENT.

The principal object of both the original and the second contract was the dredging of the channel described in the act of Congress. This was the thing to be accomplished, and to this the deposit of the spoil was merely incidental.

By the original specifications (sec. 58, R. 59) the right was reserved to the Government to make such changes as might be necessary or expedient to carry out the intent of the contract, and the contract itself (sec. 6, R. 63) made further provision for changes or modifications. If the Government had chosen to accede to Axman's request to permit him to dump in deep water, he of course would not have complained, nor could the Bonding Company, for it had consented in advance to the making of such changes.

The original contract between Axman and Heuer, however, was never changed, nor are Axman and his surety in any sense parties to the second contract. *Quoad* them, the second contract is material only as it fixes fairly or unfairly, in conjunction with the work done under it, the measure of their liability.

After the annulment of the contract by reason of Axman's default it became the duty of the Government to complete the work at reasonable cost and to diminish as far as possible the loss which it had suffered and for which it proposed to hold the defendants liable. The change which was made in

the terms was to the manifest ease of the defendants and lessened the cost of the work as relet without increasing in any particular the burden which either the principal or the surety had assumed.

Where the Government relets a contract, the sureties—and *a fortiori* the principal—are not relieved because there are differences in the terms which diminish the cost of the work as relet.

United States v. *McMullen*, 222 U. S. 460 (Jan. 9, 1912).

We rely upon this case as controlling and decisive of the case at bar. The similarity of incident and issues is unique. This decision followed in time the first opinion of the Circuit Court of Appeals herein, and it may fairly be assumed that the latter court was as yet unadvised of it at the time of its final action.

CONCLUSION.

The judgment should be reversed and the cause remanded, with directions to grant a new trial.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1914.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1913

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JULIA A. AXMAN, Executrix of the Last Will and Testament of Rudolph Axman, Deceased, and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants in Error.

No. 242

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR, JULIA A. AXMAN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF RUDOLPH AXMAN, DECEASED.

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Table of Cases Cited.

In addition to the above cases, we desire to call the Court's attention particularly to the decision of the Circuit Court of Appeals on the first writs of error herein where the questions are fully discussed and the authorities carefully considered:

American Bonding Co. vs. U. S., 167 Fed., 910.

The opinion is set out in full at the end of the record herein.

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Introduction.

The brief filed for the United States (received as this brief goes to print) relies on one case,

U. S. v. McMullen, 222 U. S. 460,

concerning which it says, "the similarity of incident and issue is unique".

We might well rest our argument also on this one case, which is so like and so *unlike* the case at bar that it illustrates defendant's position perfectly and points the argument against the Government's contentions with most unusual accuracy.

The McMullen case was decided, expressly, upon the presence of those elements and circumstances that are lacking here, and the absence of those which appear in case at bar. There is indeed a similarity of circumstances, in that both arose on dredging contracts with the United States, and that the words "place of deposit" appear in each record; but on every essential feature there is an absolute *contrast*, not similarity, between the two.

We will consider the *McMullen* case more fully elsewhere in this brief. It suffices at this point to say that the contractor there undertook to deposit the spoil either on shore or in deep water, at the option of the United States, and without difference of price; that the work was wholly abandoned and the contract breached and liability for general damages incurred, the right to recover which the annulment specifically reserved; that the United States took charge a year and a half *after* the time for completion; that the relet contract was on the same specifications—repeated word for word—as the first, and was expressly a continuation thereof, and

that all the work done under it was included in the original contract. In the present case, however, it appears that Axman undertook to deposit the spoil on land and impound it, and not only was not required or allowed but could not have been asked to deposit in deep water, as the contract could not be changed without his consent; that the contract was *annulled* shortly after he commenced work and while he was actively at work; that no liability for damages arose—merely a liability under the provisions of the annulment clause, to pay the cost of "completing the contract"; that the second contract included work not included in his contract at all.

The *McMullen* case was an action for damages and decides these propositions (apart from the matter of extension of time which was the main point argued in that case but is not involved here): that when a liability for damages has accrued through breach of the contract the giving of a notice of annulment which reserves all rights to recover damages does not affect the Government's right to recover on that liability; that the change in method of deposit was immaterial as the Government had "reserved an absolute right of choice in this regard" and that the failure to attain the *object* of the contract (i.e., its *general* purpose) was immaterial "so long as the work done towards it was work that the first contractor had agreed to perform." It is obvious that the reasoning of that case sustains the contentions on behalf of the contractor in this.

Apart from the citation of the McMullen case, the argument of the brief is simply that the "principal object" of the contract was the dredging of the channel, and that the deposit of the spoil was "merely incidental"; that the Government reserved the right to make changes; that the change was for the benefit of the defendants and lessened the cost of the work.

The contract shows, however, that the provisions as to *the place of deposit of spoil* are not incidental, but are so material as to be absolutely essential. It shows also that instead of the government reserving the right to make changes, it expressly provided that no changes that might either increase or decrease the cost could be made without Axman's consent. Finally, the second contract, instead of being "manifestly to the ease of the contractor", introduces new obligations and contemplates other and different work *not included in the original contract at all*, and for which he never in any way agreed to pay; even if it were otherwise, the new contract nevertheless would not afford any basis for a liability against him, as it is not a compliance with the contract provision which alone was to give rise to such liability, and which the parties agreed would be the sole measure thereof.

It is also suggested in the brief that as Axman had requested that he be allowed to deposit the spoil in deep water, this would have constituted a consent to such a change *if* the request had been granted.

But his request was *not* granted; and it was only that *he* be allowed to so deposit the spoil, at *that* price, not that someone else with a different kind of plant do it at some other price. Under the contract his consent, the reasons for the change, and the price, had to be in writing, and there is nothing to show that he would have agreed to the change even at an increased price if any plant but his own was to be used and he nevertheless held liable for the cost. For the same reason his request for such permission does not at all indicate, (as may be argued), that the method followed under the second contract was in fact as cheap as that prescribed in his own contract. The record sufficiently shows that while his plant was well adapted to the deep water method the requirements imposed by Colonel Heuer as to the placing of the bulkheads and impounding put him to great and unexpected expense and delay, for the very reason, as Colonel Heuer stated (R. 148), that his boats drew too much water. But the fact that Axman himself was so situated as to prefer one method to the other does not at all imply that the other bidders were in the same position.

On the other hand the fact that Axman offered to do at 11.48 cents per cubic yard the very work for which the Dredging Company received 14.48 cents should certainly preclude the United States from claiming, as against him, that the latter rate was a reasonable one, or a necessary expenditure, and from requiring him to pay $65,000 for work which he was refused permission to do for nothing.

Statement of Facts.

The statement of facts in the United States' brief is substantially accurate, except in saying that the action was brought "to recover from one Rudolf Axman and the American Bonding Company of Baltimore, as his surety, *damages* sustained by the United States by reason of Axman's failure to carry out a dredging contract".

As we understand the action, it is not for damages at all; neither can it be said that Axman failed to carry out his contract. The contract was "annulled" long before the time for completion, and the action was brought to recover the amount which the United States claims it expended in doing "the work left undone by Axman", under the contract provision that in case of annulment the Government should proceed to complete the contract at Axman's expense.

In short, the action is *on the contract*—on Axman's agreement to pay for certain work—and is *not at all* an action for any damages arising from a failure to dredge. The importance of the distinction is seen in the argument that as to Axman and his surety, "the second contract is material only as it fixes, fairly or unfairly, in conjunction with the work done under it, the measure of their liability" (p. 7). The question is not as to the fairness of any "measure" of damages or liability, but whether or not the Government has complied with the contract pro-

vision and has done *the work* for which Axman agreed he would pay, or has done some other work for which he did not agree to pay. The defendant's position, sustained by the Circuit Court of Appeals, is simply that the money paid by the Government on the second contract was for doing different work, for which Axman and his surety cannot properly be charged. The only question as to the "measure" of liability is as to whether any measure other than that prescribed by the contract can be resorted to. As the contract definitely prescribes the cost of completion as the only measure of liability the question of whether some other measure of liability would be fair cannot arise. In fact, however, the "second contract" was manifestly unfair as a means of measuring Axman's liability.

The action is not an action for damages sustained "by reason of Axman's failure to carry out a dredging contract" for the *further reason* that no such "failure to carry out" was involved in the case. The engineer officer in charge gave the notice of annulment "for failure to comply with the specifications" (R. 91) while Axman was actively at work striving earnestly to overcome the difficulties with which he had unexpectedly been confronted, and attempting to perform the contract, and when he still had nineteen months ahead within which to carry out the contract. Instead of being based on failure to carry out the contract, therefore, the case is strictly one of annulment—of the United States having elected to terminate the contract while still partly executory, and to take the work into its own

hands from that time forward. Under such circumstances there could have been no liability for damage unless because of delays; there could be no liability for damage for non-performance. No damage or injury through delay is suggested. Nor is there any suggestion—or basis for any suggestion—that Axman failed to carry out the contract, unless in the one respect given by the engineer as his reason for annulling it: that he had failed to comply with the requirements of the *specifications* as to *average yardage* per month. Whether *such* failure to comply with the specifications justified an annulment (the contract providing other means of expediting the work and contemplating annulment only in case of bad faith), is a very serious question, but one which is not before the court at this time. The same is true as to the showing of Colonel Heuer's animus toward the contractor. But while these questions are not directly involved here, it is to be noted that the annulment was in fact based only on such failure to make the specified yardage, and that this in turn resulted not from any unwillingness or bad faith on the part of the contractor, but from acts beyond his control—firstly, unexpected and unusual storms, and secondly obstacles placed in his way by the engineer officer in charge by an interpretation of the contract and an exercise of his discretion which would seem to show such prejudice as to imply bad faith on the part of the engineer himself —such prejudice as that of which another court expressly said *implies* bad faith (in a *finding* which nevertheless passes on the *law*):

"Colonel Heuer, the engineer officer in charge of the work, manifested toward the claimant from its beginning to its close a feeling of intense dislike and prejudice, and at times treated him with extreme discourtesy and unreasonableness. * * * He endeavored to have the contract annulled for failure to furnish the bond provided therein as promptly as he thought it should have been done, and he made a similar attempt subsequent to the explosion of Arch Rock by the claimant. *His construction of the contract and specifications was uniformly technical in the extreme;* he declined to grant reasonable and courteous interviews and dismissed polite appeals with harsh and profane language. His exactions under the contract and his rulings in respect thereto were *so erroneous and unjust as to imply bad faith.*"

Axman v. U. S., Ct. Claims, 28,707, Feb. 12, 1912, May 27, 1912.

On the evidence here of the same things—discourtesy and unreasonableness—technical constructions, and harsh and profane treatment (R. 127, 149)—all which likewise "imply bad faith", the jury, had it passed on the evidence, must have found that the annulment was the result of malice and prejudice. But even though the verdict for defendants was *directed* by the court, we submit that in the absence of a verdict for plaintiff and the presumptions arising to support it, the decision and actions of the engineer shown on this record (R. 125-133) and the annulment so determined on, *do not constitute any evidence whatever that the contractor was guilty of the slightest bad faith or of any breach of the contract.* The only fact shown is the bare fact of

annulment. While, as already stated, the question of the engineer's state of mind, and of whether the annulment was proper, are not before the court as such, the fact that this is not a case of bad faith or breach or abandonment on the part of the contractor, but essentially an action to enforce the drastic remedy of annulment, is all-important.

The very letter referred to in the United States' brief as containing "numerous excuses and promises of expedition" indicates, (and the record elesewhere shows) Axman's sincere efforts to overcome the unforeseen obstacles—that he had assembled a plant costing $175,000, the largest and best on the Pacific Coast; that the water in the designated dumping ground was so shallow that it was impossible to get within it except during the comparatively short periods of high water; that he had to charter a suction dredger at $8000 a month (R. 130) to dig a basin therein and a channel leading to it "so that he might get his barges in behind the bulkhead," to quote Colonel Heuer's words (R. 115), although the proposal for bids stated that the place *"available for the deposit of material from scows"* had a width of from half to three-quarters of a mile (R. 78).

We mention these matters at this time only to point out that this is not the ordinary case of a contractor abandoning the work or failing or refusing to perform, but that the delay, which *alone* is complained of, was occasioned by an interpretation of the contract by the engineer officer in charge, which was at least unexpected and unforeseen by the con-

tractor, and with which he was nevertheless earnestly attempting to comply, when the Government at the instance of the engineer officer arbitrarily exercised the option of taking the work out of his hands. In the one class of cases the Government properly recovers general damages; *in the other it must recover under whatever special remedies the contract reserves to it after annulment and not otherwise.*

Axman's contract was to do such dredging in San Pablo Bay as might be required by Colonel W. H. Heuer, (the engineer officer in charge), in accordance with the specifications attached (R. 85). The specifications were made part of the contract (R. 75, 84). Axman was to have sixty days from date of approval, to begin work, and twenty-eight months thereafter to complete it; the notice of approval was given January 3, 1903, which made his completion date July 4, 1905. Among other things the contract provided substantially as follows:

In paragraph four (R. 85) that if the contractor should

> "in the judgment of the engineer in charge, fail to prosecute *faithfully and diligently* the work in accordance with the *specifications and requirements of this contract*"

the contract could be "annulled", whereupon all money or reserve percentage would be retained

> "until the final completion and acceptance of the work herein stipulated to be done",

and that the United States should have the right "to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid", etc., and that upon the giving of such notice the party of the first part "shall be authorized to proceed to secure *the performance of the work* or delivery of the materials by contract or otherwise in accordance with law" (R. 85).

In paragraph 5 (R. 86) that if the contractor did not complete the work within the time agreed on, the time limit could be waived and completion within a reasonable time allowed.

In paragraph 6 (R. 86),

> "If at any time during the prosecution of the work it be found advantageous or necessary to make *any change or modification* in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor or material, as would *either increase or diminish the cost* of the work, then such change or modification *must be agreed upon in writing by the contracting parties*, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred".

The specifications contained the following provisions in substance:

In paragraph 31 (R. 76) that the contractor would be required to prosecute the work "with faithfulness and energy," and to complete it within twenty-eight months from commencement.

In paragraph 32 (R. 76), that "unless extraordinary and unforeseeable conditions supervene" the time allowed is considered to be sufficient; that if the work is not completed within the time stipulated the time limit may be waived and completion within a reasonable time allowed, the contractor being charged with cost of additional superintendence, etc., which might be remitted as to time lost through "abnormal force or violence of the elements" etc., or "other unforeseeable cause of delay arising through no fault of the contractor".

In paragraph 36 (R. 77), that "the work to be done is to excavate a channel, etc., to deposit the spoil, etc., and to impound the material behind bulkheads or dykes", etc.

In paragraph 38 (R. 78), that material dredged outside the designated lines "or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for".

In paragraph 39 (R. 78), that "all dredged material is to be deposited within the limits of the area described in paragraph 36".

In paragraph 40 (R. 78), that "the part of the area available for the deposit of material from scows has an average width of three-quarters of a mile".

In paragraph 41 (R. 78), that "all material dredged and not disposed of as directed" "or any unauthorized dumpage", must be properly disposed of when required.

In paragraph 45 (R. 79), that payments would be made monthly, "provided a satisfactory rate of progress as described in paragraph 46" has been made.

In paragraph 46 (R. 79), that "the work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payment, etc., an *average* of not less than 100,000 cubic yards per month must have been dredged *and deposited*", etc.

In paragraph 47 (R. 79), that if the plant be deemed insufficient or inadequate "the contractor will be required to increase or change the plant to the extent found necessary".

In paragraph 48 (R. 80), that if it be found "that the required minimum rate of progress is not being maintained, the engineer officer in charge shall have the power" (after notice), "to employ such additional plant" as may be necessary to insure completion in time, at the expense of the contractor, also that the provision should not affect the right to annul "as provided for in the form of contract to be entered into".

In paragraph 50 (R. 80), "that all material will be paid for by the cubic yard *measured in place*".

In paragraph 58 (R. 81), that the right is reserved to make "such *minor* changes in these speci-

fications as may be necessary or expedient to carry out the interest of the contract", and that no increase in price shall be paid to the contractor for such changes "except as provided in the form of contract to be entered into".

Under this contract Colonel Heuer had certain discretionary powers with reference to the place of deposit. He (through an assistant) designated a place for the bulkhead which he said was "very near" the end of Point Pinole, (R. 114), and which Axman said was eight hundred feet inshore (R. 124). The result, according to Mr. Axman, was that instead of the place available for the deposit of material being from half to three-quarters of a mile wide it was not over 600 feet wide (R. 125); that the water was nowhere over four feet deep and only of that depth in a small area (R. 126), and his barges or scows would only reach the prescribed dumping ground near the time of high tides (R. 126, 129). To meet this condition he ordered special shallow draft barges built to get in behind the bulkhead at low water (R. 127). He requested permission to dump the material outside the bulkhead and lift it over with an additional dredger; it was refused (R. 126). He employed a suction dredger to dredge a channel so he could get his barges into the place of deposit (R. 130), but discontinued because the engineer officer would not allow the material to be spread above low water mark (R. 127). In

addition to these unforeseeable obstacles the weather conditions were unusually adverse (R. 129); also, he met with great delays in his efforts to "create additional appliances" to meet the new conditions (R. 139). For these reasons he did not make rapid progress during the first few months. Meanwhile, he requested permission to deposit the material on the north shore of the bay instead of the south; also, to take it to San Francisco and use it to fill in certain waterfront property there (R. 129, 133); also, to dump in deep water at "The Sisters" under his contract and at *the same price* (R. 126, 127). All these requests were refused. December 24, 1903, Colonel Heuer gave him notice that the contract was annulled "on account of failure to comply with the requirements of the specifications" (R. 91). At the time he still had over a year and a half within which to complete the work.

After the annulment Colonel Heuer advertised for bids under the same specifications, and rejected all the bids received (R. 92). He then advertised for bids covering the alternative methods of disposing of the spoil, and thereafter let a contract to the North American Dredging Company which obligated that company to transport the material five miles down the bay (R. 99), and there deposit it in such manner that the top of no pile should be within forty feet of the level of low tide (R. 99). The advertisement reserved to the Government the right to award the

contract *"irrespective of price"*, for "such place of deposit as may be considered most advantageous to the United States" (R. 98) and *there is not a word in the record to indicate whether or not a lower bid was received (among the final set submitted) to do the work and deposit the spoil on the shore (under 36a) at a lower price than that made by the Dredging Company for doing it in accordance with 36b)*. The testimony is that the price at which the contract was let was "the lowest price at which any contractor offered to do that work for the Government *in accordance with the provisions of that particular contract"* (R. 114). But "the provisions of that particular contract" called for depositing the spoil in deep water, and there is nothing whatever to show what bids were received for the other method of deposit. As the United States expressly reserved the right to award the contract for one method or the other regardless of price, there is no basis for any presumption that the method chosen was cheaper than that rejected.

Upon the completion of its contract by the Dredging Company this action was commenced to recover the excess cost from Axman under the contract provision giving the United States the right to recover the cost of completing his contract. The complaint alleged in general terms Axman's agreement to do the work at the agreed price and set out *in*

haec verba the provisions of paragraph 6 as to annulment and the recovery of the cost of completion.

The other essential allegations of the complaint were that Axman abandoned the work and refused to do the work, and failed to prosecute it "faithfully and diligently, *or at all*" (R. 6); that the engineer therefore annulled the contract (R. 7) and a contract "to do the work left undone" was let to the North American Dredging Company (R. 7), which "carried out the work and completed the contract" (R. 7).

No evidence whatever was introduced in support of the allegation of abandonment, etc., the case as presented being based wholly on the annulment. The wording of the notice showed that the annulment was "for failure to comply with the requirements of the specifications" (R. 91), and Colonel Heuer frankly stated his reasons in his testimony:

> "The opinion that I arrived at was that he was not carrying out his contract. His contract required at least 100,000 cubic yards a month of excavation" (R. 90).

On the first trial the court admitted the contract with the North American Dredging Company and instructed the jury that the difference as to the work to be done did not constitute a defense—practically directing a verdict for the Government. On the second trial the contract was excluded, as not showing a compliance with the requirement of the Axman contract that the Government complete *the work;* the proffered testimony of expert witnesses

that the work as done cost less, in their opinion, than the work under the alternative specifications *would* have cost, was excluded, and a motion for non-suit was granted. Although the testimony offered was tentatively received, the objection was afterward sustained and the evidence offered is not properly a part of the record. There was no cross-examination or rebuttal of those witnesses as defendants relied on their objection which the court was bound to sustain—and did sustain—in view of the decision of the Circuit Court of Appeals following the first trial. Essentially, then, the record shows:

The United States sues to recover the cost of completing a certain contract, such recovery being the measure of liability provided by the agreement. It offers in evidence a contract to do work which is not "the work to be done" under the first contract, but includes other, new, work. The evidence is excluded and a non-suit granted. The sole question, therefore, is whether the contractor and his surety are liable, under the agreement to pay the cost of completing his contract, for the money expended under the second contract.

Argument.

THE ACTION IS NOT FOR DAMAGES, BUT IS ON A CONTRACT TO PAY THE COST OF CERTAIN WORK.

This is not an action for damages, but an action to recover under the contract provision that Axman

would pay certain amounts under certain circumstances.

It is held that a plaintiff in such an action as this, based on annulment, can only recover under the contract:

> "In instituting the suit, the county planted itself upon the contract, and upon the bond given for its faithful performance. * * *
>
> "The distinction sought to be drawn by the plaintiff, that the suit is not one on the contract, but for damages on account of the abandonment of the contract, does not appeal to us. This is not a case like *Fuller Co. v. Doyle,* 87 Fed. 687, where the contractor * * * *abandoned* the contract, but a case where the contractor * * * had his employment *terminated* under article 5 through a strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract, but damages *under the contract,* resulting from a violation of its provisions."
>
> *American Bonding Co. v. Gibson Co.,* 127 Fed. 671.

The action is on the contract provision for the recovery of an amount agreed to be paid to the Government for "completing the contract". If Axman had abandoned the work or had failed to perform it within the time agreed, a right to damages would have arisen, and perhaps the cost of something substantially the same might have been a fair test. But where the work is taken out of the contractor's hands while he is carrying it on, no such right arises; and the Government,

proceeding under such a stipulation, is confined strictly to the remedies it gives.

In a recent case in this court it is directly held that the provision for annulment does not give rise to any general right to damages, and that the Government, under such a provision, can recover only what is expressly allowed it by the contract. In that case, there being a provision only for retaining the reserved percentages, it was held that the Government could not recover anything beyond their amount. So here, as the Government reserves only the right to recover the cost of completing the contract, it is not entitled, on annulment, to recover general damages for whatever injury it would have sustained if the contractor had abandoned the work.

U. S. v. O'Brien, 220 U. S. 321.

The above case is strikingly like the present case in the question presented, although there is a marked contrast on the facts. It arose on a dredging contract which contained the same provision as the Axman contract that if the contractors should, "in the judgment of the engineer officer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract", it might be annulled; and, in addition, the provision (not in the Axman contract) that thereupon all reserved percentages should be forfeited to the United States; it did not have the provision on which the present action arises, that on

annulment the United States could complete the work at the contractor's expense. (The Axman contract provides that the reserved percentages shall be *retained* until completion, not that they will be forfeited.) In addition the contract in the O'Brien case contained the further provision, however, that "in case of *failure* on the part of the parties of the second part *to complete this contract* as specified and agreed upon", the United States should have the right to recover from the contractor "whatever sums may be expended by the party of the first part in completing the said contract" in excess of the contract price—the very provision which the Axman contract reserved in case of *annulment*.

In the O'Brien case, as here, the engineer became dissatisfied with the rate of progress. A notice of annulment was given, as in the case at bar, long prior to the completion date. The work was completed by another contractor at increased cost. The action was to recover the sums expended in so completing the work, after annulment; the only question was whether the contract provisions imposed any liability therefor. It was held that the failure to comply with the specifications as to rate of progress, while ground for annulment, did not constitute a breach, or a failure, under the provision as to "failure to complete this contract as specified and agreed upon" so as to make the contractors liable under that provision for the cost of completion, but that the only remedy on annulment was that expressly reserved—the forfeiture of the reserved percentages.

In the course of the decision the court said, as to the rate of progress:

> "The sole material express promise of the contractors was to complete the work by July 1, 1902. If the work was done at that date, that promise was performed, no matter how irregularly or with what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result" (327).

That the United States is only concerned with the completed result is obviously equally true under the Axman contract, in view of the fact that the provisions as to rate of progress are plainly intended to control only the right to receive payment and contemplate that the contractor shall maintain the prescribed rate not month by month, but only as an average rate. The decision says further:

> "*It would be a very harsh measure to pronounce the contract broken when, but for the prohibition of the United States, the defendants might have done the work in time.* The right to terminate the employment of the defendants, coupled with a provision for monthly payments based upon the amount of material removed, and therefore, of course, giving little pay for little work, is the protection expressly stipulated by the United States" (327).

Further, that the paragraph giving the right to recover the excess cost of completing the work

> "*gives that right only 'in case of failure to complete this contract* as specified and agreed upon.' On their face these words mean failure to complete by July 1, 1902; not failure to complete because turned off by the engineer in

> charge a year and six months before that time arrived, when competent persons still might do the job" (327-328),

which is equally applicable here as to the question of whether Axman failed to complete the contract, as alleged, and whether he ever became liable for damages for breach. The opinion continues (referring to such liability for excess cost):

> "The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due" (328),

and concludes (after discussion of other matter):

> *"The suit is upon the contract, but the United States asks more than, in our opinion, the contract gives"* (328),

which we contend is exactly the case here. Just as the O'Brien contract provided for only forfeiture of reserved percentages, and could not be construed to impose liability for excess cost, in case of annulment, so the Axman contract, providing for the recovery of "the cost of completing the work", cannot be considered as imposing liability for general damages, or for any cost, estimated or actual, except the cost of "the work".

The case seems to us to be a conclusive authority on the propositions that annulment by the engineer before the completion time does not show a breach or failure of performance by the contractor; that an action based on such annulment is an action on the contract, and not for damages; and that on annul-

ment no rights or liabilities arise except such as are expressly provided.

If the failure to maintain the specified average yardage be considered a *breach* of the contract, it is nevertheless a *non-essential* breach, and not of any importance on the issue and record here. The liability arising from such breach would, in general, be only for such damages as resulted from the delay. If, for instance, because of such delay the United States was unable to send a battleship through the channel to Mare Island, and had to send it to Puget Sound, the increased expense would provide a measure of damages; but even this could arise only in case of delay extending beyond the time of completion—in other words, failure to perform the essential agreement to complete within the time allowed. It would be very difficult to determine what damage could possibly be sustained by failure to complete, in a given month, the one-twenty-eighth part of the work to be done on an unfinished unusable channel. As stated in the *O'Brien* case, final completion within the time is the important matter; and for that reason the Axman contract provided against serious delays by giving the Government full control over the rate of progress, with the right to expedite it by the employment of additional men and plant if necessary (Sp. 47, 48; R. 79), and even to take the work over and complete it if the contractor did not proceed faithfully and diligently (Sp. 48, R. 80; Contract 4, R. 85). These specific remedies would seem to replace and exclude the very uncertain remedy of recovering damages for delay.

Mere delay during the progress of the work, even if regarded as a breach of the provision as to average yardage, would not in itself be considered such essential or total breach as would make the contractor liable for general damages measureable by either the reasonable or actual cost of completion. *Even the annulment clause does not make the specified yardage essential;* the essential elements

under it are good faith and diligence. And even when they are lacking the liability is for actual cost of completion, not estimated damages.

The clear intent of all the provisions is that the United States will be enabled to *prevent* damage accruing and to guard against the usual uncertainties of claims for unliquidated damages for failure to perform.

The contract does not anywhere reserve any right to recover general damages, even in case of abandonment or repudiation. The evident intent is that the annulment clause is to be the Government's preferred and only remedy in case of any breach however serious; that in any case—certainly in such a case as this—the United States would seek its remedy not in a suit for general damages, but in completing the contract and recovering the cost. This provision substituted certainty for uncertainty, and the expense of actual completion for experts' estimates of probabilities; and the contractor as well as the Government is entitled to its protection.

In short, even if non-compliance with the provision as to average yardage was a breach of the contract, there was no liability for general damages, but at most a liability only for such damage as might have been sustained through the delay, if indeed it was not the intent of the parties that the right of expediting the work would replace the right even to such damages. **But no such damage was claimed or attempted to be proved, the only contention and issue being that the United States had exercised the right to complete the work under the annulment clause, and had completed the work left undone, as required by that provision.**

It may be added that if the contractor had in fact **violated some most essential provision,** and if the contract left hi munder a general liability **to pay damages,** they could not properly be fixed or based on **changed** work and **estimates, in view of the contract provision that all changes must be agreed to by him in a writing setting forth the change and the price thereof.**

~~ment no rights or liabilities arise except such as are expressly provided.~~

THERE CAN BE NO RECOVERY EXCEPT FOR COMPLETING THE WORK.

Essentially, this action is based on the proposition that Axman agreed that he would pay to the Government whatever it expended in "completing his contract". Everything else in the case is incidental to this. The Government is now seeking to enforce this liability only—a liability to pay it the agreed compensation for the work agreed on.

In a sense, the United States is in the same position as any other person who makes a contract to do certain work and then seeks to enforce payment; the question that arises is whether *the work agreed on* has been done. The case is fundamentally the same as if the action were brought on an independent contract whereby Axman agreed with the Government that if the latter would complete his contract (identifying it by date, etc.), he would pay it all amounts actually expended in so doing; could the Government under such a contract do some other work instead and recover *on the contract?* Yet this action is brought on the contract—on the agreement set forth in the complaint, that Axman would pay the amount expended. The fact that the Government was one of the parties to the original agreement, whereby

it agreed to pay Axman for certain work, is immaterial. So far as this special covenant of Axman's is concerned—the agreement on his part to pay the Government for completing the work—the Government is in the same position as any contractor would be who undertook to complete the work required by the original agreement.

It is perfectly clear that any third party who made such an agreement with Axman could not recover on the contract by doing the work which was done by the Dredging Company. No doctrine of substantial performance, however loose, would allow recovery on such a contract, in the face of the provision that "material deposited otherwise than as herein specified will not be paid for" (R. 144). No contention that the substituted performance was as cheap would avail in such an action on the contract. In an action on the contract such contractor would be in the position of a builder who had built a house which was perhaps good and perhaps cheap, but was certainly not the house agreed on. There could be no recovery on the contract. There is of course no question, in this case, of any recovery on quantum meruit, or on any implied agreement, nor is there any question of general damages. The action is founded expressly on Axman's special agreement to pay; and no cause of action could arise, *through the annulment,* except upon that agreement.

The case does not involve damages in any way, but only the question of performance of contract

obligations. Axman did not agree to pay to the Government whatever damage it might sustain if the contract was annulled. He did not agree to pay such amount as might be equal to the *probable* or *estimated* cost of completing his work. He did not agree to pay the cost of *similar* work. His agreement was, specifically, to pay "whatever sums may be expended" in "completing the said contract".

No claim is made here for any damages except the excess cost of completion after annulment. No suggestion was made (and there is no basis for any) of any failure to comply with the contract, except in not making the specified average yardage. No damages could arise from that, as under the contract the Government retained all earned payments and had the right to put on additional plant, etc., and so avoid any damages (Spec. 47 and 48; R. 79-80).

Such a provision for annulment shows that damages were not to be recovered in case the contract was annulled.

> "The remedy provided for the company in case of non-compliance with the contract by the contractors, and manifestly the only remedy contemplated by the parties, was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have the unpaid part of the earnings forfeited."
>
> *O'Connor v. Bridge Co.*, 27 S. W. 251, 983.

The contract as a whole shows clearly that in case of annulment no damages, as such, were to be recoverable, but that in that event, the United States should be limited to the recovery of the amount expended in completing the contract. And in this action, as said before, the Government "plants itself on the contract", and must recover on the contract or not at all.

A case involving the precise question presented here—and, we contend, decisive of it—was before the Circuit Court of Appeals in 1901: *American Surety Company v. Woods,* 105 Fed. 741, 45 C. C. A. 282, 106 Fed. 263.

There, as here, a contract had been annulled under a provision allowing the employer to take charge and complete the work. It was held that such provision limited the manner in which the damages could be ascertained, and that a recovery could not be had unless the employer had in fact completed the work; that he could not recover general damages but must proceed under the contract provision.

We quote from the syllabus:

> "A contract for the doing of certain work, which provides that in case of delay in doing the work the employer may take charge thereof, and *complete it at the cost of the contractor,* not only provides the measure of damages for the breach of the contract by the contractor if he shall fail to complete the work, but also the manner in which the amount of such damages shall be ascertained; * * * on the

failure of the contractor to complete the work, without fraud or bad faith, the employer *cannot recover* as *damages* for breach of the contract the difference between the contract price and the cost of completing the work, as estimated by experts, where it abandoned the work, and in fact *expended no money on its completion.*"

American Surety Co. of N. Y. v. Woods, 105 F. 741; 45 C. C. A. 282; 106 F. 263.

In the present case, as in the Woods case, plaintiff attempts to recover on a showing of what the work which should have been done, *would have cost* if it had been done.

The Government has not contended that the work done under the Dredging Company contract was substantially *the same* as the work included in the Axman contract, but introduced testimony tending to show the comparative cost of the work under the two contracts. On its own showing the requirements of the two contracts were different, but it was contended that it would have cost at least as much to complete the Axman contract as it did to do what was done under the Dredging Company contract.

There is nothing more or less than an attempt to show, *by the estimates of experts,* what it *would* have cost to complete the Axman contract. It is squarely within the rule laid down by the Circuit Court of Appeals in the Woods case that such estimate cannot be made the basis of recovery.

Mr. Axman's contract was not to pay the reasonable value of the uncompleted work, but to reimburse the Government for its *expenditures* in doing that very work. We contend that the work was not done and that Axman and his surety cannot be held liable for the expense of doing *other* work, or for the *estimated* expense which would have been incurred *if* the Government had done the work agreed on.

If the work done by the Dredging Company is not within the terms of Axman's agreement there can be no recovery for the cost of doing it. The contract is that the Government may "proceed to secure the performance of the work" and recover from Axman the extra cost of completing the contract; but the contract gives it no right to recover for work materially different.

The position of this defendant in error, in short, is that as the Government did not complete the Axman contract, but did some other work instead, it cannot recover. We contend that Mr. Axman was entitled to insist on the strict performance of the agreement sued on—the agreement that the work specified in the first contract should be completed. We contend that the work actually done was not the work contemplated, but materially different, and included work not contemplated at all.

The correctness of defendant's contention was recognized, apparently, when the complaint was drawn, as in it the United States alleged the completion of the work—"the work left undone," to quote from the complaint itself. On the trial this position was virtually abandoned by the offer of testimony intended to show that the work actually done under the second contract was cheaper; not that it was the same.

But while the evidence offered was doubtless intended to show that completing the Axman contract would have cost at least as much as the work actually done, it in fact was not pertinent even to that question.

The evidence offered did not offer any basis for estimating the cost of completing the Axman contract. *No one of the witnesses was asked about the cost of completing that contract, or doing the work left undone under it.* Axman had constructed 2,400 feet of bulkhead. Even if the witnesses knew of this they could not take it into account in their answers. They were asked only as to the cost of doing the work under specifications that did not give them any right to use it, but expressly required bulkheads *to be built* by the contractor (R. 98, par. 36a) at points designated, which might be miles from Axman's bulkhead. Each of them testified expressly with reference to doing the work *in the manner specified.*

Any testimony as to comparative cost seems immaterial as *the only issue* was whether *the work was the same;* see allegations that the United States contracted for the doing of *"the work left undone"* (R. p. 4), that the second contractor *"carried out the work and completed the contract"* (R. p. 4), and that the cost of doing *"the same work"* (R. p. 5), under the second contract was more than it would have been at the price Axman set. Evidence that work is *cheaper* does not show that it is *the same.* The gist of the complaint is that the same work was done; the proffered testimony, however, was not that it was done at a certain cost, but what it *would* have cost *if* it had been done,—a matter *not in any way within the issue.*

In short, the evidence offered at the trial did not tend to show what the cost of completing the Axman contract would have been; but if such cost had been shown, it would not have been within the issue, which required the Government to show what it actually expended in completing the same work, not what it *would* have expended *if it had* completed it. The offer to show comparative cost was really an admission that the work was *not* the same as that which the United States was atuhorized to perform and which it had alleged it performed.

It is clear that the work left undone was not, as a whole, completed. If part of it could be left undone, or replaced by other work, and the probable cost shown by experts' estimates, *other parts*, or *all*, could be left undone, or replaced by other work, and the probable cost of the whole work shown by such estimates. That is precisely what the *Woods* case holds cannot be done, and what the contract itself expressly means to avoid by providing, not that the United States shall recover such *damages* as it may sustain, or the reasonable cost of the work, but the *actual* cost of *completion*, a provision which in the words of the *Woods* case, "rescued the case from the uncertain and speculative control of expert witnesses, and applied to it the practical test of actual cost."

The United States should certainly be precluded from claiming that the work done was allowable and the change immaterial *by the interpretation it repeatedly placed on the impounding provisions* as material, particularly in refusing Axman permission to make that same change. **It cannot consistently claim against him that impounding was essential and then, for its own purposes, that it was not.**

Apart from everything else the United States *under the pleadings*, cannot properly rely on any showing that the work it did was cheaper. **The contention on which the case was based from first to last was that the United States completed the same work Axman had contracted for—the work left undone. On that issue, we submit, there can be no right of recovery except on proof of the completion of that work.**

THE CHANGE MADE WAS MATERIAL; THE GOVERNMENT DID NOT PROCEED TO COMPLETE THE CONTRACT, BUT DID OTHER WORK INSTEAD.

On the trial plaintiff offered in evidence a contract between the North American Dredging Company and the United States, in which "the work to be done" was not the same as the work to be done under the Axman contract. It was objected that this was a material variance from the allegations that a contract was made "to do the work left undone" by Axman, and that this contract with the Dredging Company was not a contract to do the work required to "complete" Axman's contract, and not a contract for the work for which Axman had agreed to pay. Numerous objections on the admissibility of testimony, and the motion for nonsuit, presented the same question and were sustained by the court. These rulings go to the very gist of the action—to the question of whether any cause of action can be based on the doing of the work included in the contract made with the Dredging Company after the annulment of the contract with Axman.

We contend that the contract with the Dredging Company is not in fact a "contract to do the work left undone by Axman" and that the doing of the work required by the contract with that company is not a compliance with the contract provisions under which recovery is sought here—that the provision of the Axman contract as to annulment made Axman responsible only for the expense

of "completing *the said contract*", and that Axman was not responsible for the cost of anything except the work specified in his contract.

The contract provides that in case of annulment the United States shall have the right to recover from the contractor

> "whatever sums may be expended by the party of the first part *in completing the said contract* in excess of the price herein stipulated to be paid the party of the second part for completing the same, * * * and the party of the first part shall be authorized to *secure the performance of the work* or the delivery of the materials by contract, or otherwise, in accordance with law" (R. 85).

What was "the work" involved in these contracts?

The signed agreement (R. 84, 86), and the attached specifications (R. 73), are one instrument, and together constitute the contract (R. 75).

The specifications state what the work is.

In the Axman contract the work is definitely stated:

> "The work to be done is to excavate a channel through the shoal * * *; to deposit the spoil * * * within lines drawn between Pinole Point and Lone Tree Point * * *; and to impound the material behind bulkheads or dykes * * * built and maintained by and at the expense of the contractor * * *" (R. 77).

In the Dredging Company contract the work is stated with equal definiteness:

"The work to be done is to excavate a channel, etc., and * * * to deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from 'The Sisters,' etc. * * * The top of any pile shall not be higher than 40 feet below the level of low tide," (R. 98).

The question, then, baldly stated, is this:

Is a contract to dredge a channel and deposit and impound the spoil at a designated place behind bulkheads completed by dredging the channel and depositing the spoil elsewhere?

Clearly it is not. A contractor undertaking to do the work first mentioned could never hope to recover payment on doing the second task; the latter work could under no circumstances be considered a performance of the requirements of the former contract.

Let us suppose, indeed, that Mr. Axman, with an increased plant, and ample backing, had been given a new contract, binding him, in so many words, "to complete the former contract", or "to do the work left undone". Could he, on doing the very same work actually done by the Dredging Company, have pleaded it as a performance of that supposed contract? Obviously not. Yet the cost of that very work "left undone" is the only thing which the Government has reserved the right to recover from him.

Does the work to be done under the first contract include that required by the second? Clearly not.

Mr. Axman working under the first contract surely could not have been compelled to transport the spoil to "The Sisters", five miles away, and there deposit it in piles no part of which should come within 40 feet of the surface.

The question is whether the work done by the Dredging Company was materially different from the work contracted to be done by Axman. We contend that it was. Was the place of deposit a material part of the Axman contract? Unquestionably, yes. The contract emphatically made it an essential part of "the work to be done" (Spec. 36, Tr. p. 139); and in addition it provided—

> "Material deposited otherwise than as specified * * * will not be paid for" (Spec. par. 38; Tr. p. 140).
>
> "All dredged material is to be deposited within the limits of the area specified in paragraph 36" (Spec. 39; Tr. p. 140).
>
> "All material must be excavated and deposited under the supervision of the Engineer Officer in charge, or his agents" (Spec. par. 53; Tr. p. 145).

Under these provisions not only was the method of deposit carefully specified, but any other method was expressly provided against and forbidden. If Axman had dug every foot of the channel he could not have collected one cent unless he deposited the material as specified. If Axman had done all the work afterward done by the Dredging Company (for which payment is sought here), he could not have obtained any pay whatever for doing so.

The Dredging Company contract contains the same provisions and the additional one that the deposit of material elsewhere than at "the Sisters" would be ground for annulment (Spec. par. 42; Tr. p. 182).

If, under the second contract, the Dredging Company had in fact tried to do the work left undone by Axman, and complete his contract (impounding the spoil behind a bulkhead), its contract could have been annulled.

Nothing more should be needed to show that the contracts were not the same; that they did not cover the same work; that there was a material change in the work when the second contract was entered into.

It is contended that the provisions for impounding, etc., were "incidental", and that "the principal object of both the original and the main contract was the dredging of the channel". Clearly this was not so. Even in connection with the work of dredging and maintaining a channel of specified depth, the safe impounding of material so as to prevent its being washed back into the cut is vitally material. But a sufficient answer to the argument is that Axman did not contract to bring about "the channel described in the Act of Congress", nor to pay, after annulment, for any and all work connected with dredging such channel. His agreement was to "dredge, deposit and impound", and (in case of

annulment), to pay the amount actually expended in "completing the contract". And by "the agreement of the parties" the deposit of spoil was certainly a part of the work—a part so material that it is specifically provided for in four separate paragraphs; so material that his entire right to any compensation whatever depended upon it.

Plainly these provisions set at rest all question as to the materiality of the change made in the work. What the rule might be abstractly, as to dredging contracts, in general,—whether the disposition of the spoil would ordinarily be an essential or an incidental matter, is not the question; here the parties have in the strongest way made it material and essential and vital.

Nor is it correct to say that the second contract is material "only as it fixes fairly or unfairly", the measure of liability. The question is merely not as to the fairness of making the change, but whether the second contract furnishes at all the measure of liability prescribed by the first. The only measure to which Axman ever agreed, was the cost of completing *the same work he had undertaken.* The cost of doing different work under the second contract is necessarily not such "cost of completion." The bidders figured on different work, the difficulty of doing which entered into their calculation of the price. Whatever experts might have testified to as to the comparative cost of the work under the two contracts, the fact remains that the Dredging Company, in making its bid, figured on different work

and different conditions from those to which the contract referred, and that the work which it undertook to do was not the work which the original contractor had agreed to do.

It has indeed been expressly held that in completing a contract the cost of doing the same work, in accordance with the same specifications, can alone be considered, *even where there has been a breach* and damages are allowed. In *White v. Sisters of Charity*, 79 Ill. App. 646, the contractor had not completed the building properly, and the owner sought to recover as damages the amount it would cost to complete it. The specific defect was in the roof. The cost of remodeling it so as to make a good, tight, durable roof was taken as the measure of damages. The appellate court reversed the judgment, holding that the basis of recovery must be the cost of making the roof *according to the plans and specifications of the contract:*

> "The correct theory is the cost *to make the roof* according to the contract, that is, *according to the plans and specifications,* in case the appellant has failed to do so. * * * *That is what the appellant had contracted to do.* The court not only stated that the estimate need not be upon the basis of appellant's contract, but stated that it should be upon the theory of what it would cost 'to make a good, tight, durable roof'. This may or may not have been according to contract."
>
> *White v. Sisters of Charity*, 79 Ill. App. at 649.

The case is exactly in point here in view of the claim of plaintiff in error that the principal object

of the contract was to provide a channel, and that Axman is properly held liable for the cost of obtaining such channel, in any reasonable way. But completing the contract, as held in the above case, means completing it *according to the same specifications.* The court did not stop to inquire which roof would have been cheaper.

The provisions for disposing of the spoil, in the present case, were integral parts of the contract, not even independent parts or separable provisions, with a separate price for each on which under some circumstances a calculation of the net cost of doing a part of the work could be made. The price to be paid Axman included—in gross, and without any division—the dredging, depositing, impounding, etc. (R .80). The price paid the Dredging Company, similarly, was for all its work, of all kinds (R. 97-98).

By no possibility could these elements of "the work to be done" be separated. Within the terms of the contract they could not be performed except together and as a whole. The dredging and deposit of spoil were not independent parts of the work; they were an *indivisible unit*, constituting, together, "the work to be done". But the work to be done under the Axman contract was not the same as the work to be done under the Dredging Company contract.

We think this disposes of plaintiff's contention that the deposit of spoil was "but an incident to the performance of the work", and not a material part

of it. If the deposit of spoil were no part of the improvement contemplated—if it were but a mere incident—the Government would not have provided that all material dredged must be deposited in a specified place; that material not so deposited, either by Axman or the Dredging Company, would not be paid for; and that if the Dredging Company deposited the material elsewhere than as required it would be ground for annulment.

THE CONTRACTOR'S RIGHTS AFTER ANNULMENT ARE SUBJECT TO THE SAME RULES AS THOSE OF A SURETY.

The question of the effect of the change in work may well be considered from the point of view of a surety, for as we view the matter Axman's agreement to pay the cost of completion is subject to the same rules as the obligation of a surety. In effect his agreement was that if the government would arrange by contract or otherwise for completing the work under his contract he would be surety for the completion thereof, by such other contractor, within the stated price; that he would indemnify the United States against having to pay a larger sum.

The provision for annulment, as held in *Chesapeake Co. v. Walker,* 158 Fed. 850, is a drastic one, and confers no rights by implication. On taking the work out of the contractor's hands without an actual breach by him, the government acquires no right to recover from him any general damages, or

The above case also holds that *reletting* work to a second contractor *with changes* is equivalent to *changing the original work,* so far as liability to pay the cost after annulment or breach is concerned.

any damages of any sort except such as are specifically given by the agreement.

Indeed, the effect of the cases arising on annulments is that the contractor (like a surety) is entitled to stand, after annulment, on the very provisions of the contract, and that no recovery can be had against him except what is clearly provided for. As the annulment provision is very drastic and really in the nature of a forfeiture, the rule of strict construction must govern.

Perhaps no principle is better established than the rule that where a surety's liability has been changed by the substitution of one obligation for another, the court will not enter upon an inquiry as to whether the change was in fact detrimental. Where a substantial change is shown, the question of detriment will not be inquired into:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther.
>
> "It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be *for his benefit*. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."
>
> *Miller v. Stewart, et al.*, 6 U. S. 700, 6 L. ed. 195;
>
> *Prairie, etc. Bank v. U. S.*, 164 U. S. 227, 41 L. ed. 418.

"Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they never assented.

"*Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have the right to stand upon the very terms of their undertaking.*"

Reese v. United States, 9 Wall. 13.

"It is highly proper that the promisor be permitted to stand upon the exact letter of his bond, in the sense that no conditions or obligations may be imposed by implication, and that no construction should be made which will hold him liable beyond the express terms of his engagement. To this extent he is often properly favored. Where the intent of the parties is clearly expressed in the instrument, or has been fully ascertained from the surrounding circumstances, the rule of strict construction applies, and the Guarantor may stand upon the precise terms of his contract. In this all the authorities are agreed."

Stearns on Suretyship, Sec. 50.

"The bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the *exact letter of the bond, and if the words will not make them liable, nothing can.* There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, that it may prevail.

State v. Medary et al., 17 O. 565.

"'Non haec in foedera veni' is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated. * * *

"He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either bound in toto, or not at all."

Brandt on Suretyship, at page 812.

"The rule of law is not disputed that the liability of a surety cannot be extended beyond the actual terms of his engagement; and that his liability will be extinguished by any act or omission which alters the contract unless it be with his consent. * * *

"And it is no answer to a surety to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration—whether *he thinks* it material or immaterial. * * *

"The law will not allow others to speculate as to whether or not the alteration be to his prejudice. Adhere to this rule and the course of courts is safe and simple. Depart from it and there is no limit—where will you stop?"

Taylor v. Johnson, 17 Ga. 521.

"In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was *beneficial* to the surety, and the answer has always been that the surety himself was the proper judge of that, and

that no arrangement, different from that contained in his contract, is to be forced upon him."

Lord Langdale, Master of the Rolls, in *Calvert v. London Dock Company*, 2 Keen 638,

quoted in

Prairie State National Bank v. U. S., 164 U. S. 227, 41 L. ed. 417.

"The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, *without inquiry*, evident that the alteration is *unsubstantial*, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it *is not self-evident* that the alteration is *unsubstantial* or one which cannot be prejudicial to the surety, *the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow* the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Holme v. Brunskill (1877) L. R. Q. B. Div. 495,

quoted in

Prairie State National Bank v. U. S., 164 U. S. 227, 41 L. ed. 418.

"A material alteration of a contract is such a change in the terms of the agreement as either

imposes some new obligation on the party promising, or takes away some obligation already imposed.

"Any change in the terms of the original contract which obliges the original debtor to do something which he has not before been bound to do will discharge the surety or guarantor. This is said to result from either of two reasons:

"(1) It is an increase of the promisor's risk or hazard, etc.

"(2) *The contract as changed is not the same contract guaranteed by the promisor.*

"His execution of the original contract will not carry by implication any liability upon a substituted contract, *although the latter is similar to the first.*"

Stearns on Suretyship, Sec. 72.

"*The question does not depend upon whether there was an increase or diminution, in dollars and cents, of the contract price, but upon a change in the contract itself.* If a change be made in the contract, without his consent, the surety is discharged."

Burnes Estate v. Fidelity & Deposit Co., 70 S. W. 518, 96 Mo. App. 467.

In a recent California case alterations amounting in value to $315 were made in a certain contract for a $16,300 building, *the owner agreeing to pay the additional expense.* It was held that the surety was released. The court said:

"There is no principle of law better settled than that a surety has the right to stand upon the very terms of his contract, and that any alteration in the terms of the principal's contract, made by the parties thereto without his assent, will have the effect to discharge him from all liability.

"By such alteration the contract ceases to be the one for which he became surety, and the extent of such alteration, or whether his liability will be increased or diminished thereby, is immaterial.

"Having the right to determine in the first instance whether he will become such surety or not, he has the right to be consulted upon the terms proposed for any variation of his obligation, and if made otherwise his obligation is extinguished."

Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co., 85 Pac. Rep. 157-8.

The case of *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539, though arising in a different kind of transaction, presents the rule very clearly that *when the contract specifies certain things to be done, no liability arises from the doing of something else*, whether or not the change caused injury; exactly the question here as to the completion of the contract.

The syllabus presents the case:

"A corporation, to secure its bonds, gave a trust deed of its property, which provided for a sale thereof at public auction upon default in payment of interest, and, as further security, G., the President of the corporation, made a deed of trust of certain land, with the express condition that such land should be liable for the payment of the bonds only in case a sale of the property mortgaged by the corporation should be made, 'in accordance with the terms' of the mortgage, and the proceeds of sale should prove inadequate. The bondholders thereafter, contrary to such provision, assumed control of the property described in the trust deed made by

> the corporation, sold it at private sale, and applied part of the proceeds to the expenses of the corporation. Held, that G's. land was thereby released from liability for the payment of the bonds."
>
> *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539.

Taking up the arguments advanced there, as here, that the change of plan worked no injury, etc., the court said:

> "It does not matter what circumstances may have transpired to cause a different method to be pursued by the bondholders; if they chose to accept other methods * * * they could not hold the land liable. * * *
>
> "It is not the province of the court to inquire into the matters which operated upon the parties in specifying the particular things to be done, or whether or not the failure to do the very thing required was *injurious to the surety;* it must be enforced as the parties made it. In order for the bondholders to avail themselves of the additional security afforded by the deed of trust, they must have strictly followed its provisions and complied with its terms."
>
> *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539.

The section of the Civil Code of California, the State in which the contracts were made and the controversy arose (cited in *Alcatraz etc. Ass'n v. U. S. etc. Co.*, supra), seems in itself determinative of the question:

> "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is *altered in any respect*, or the reme-

dies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Civil Code, Sec. 2819.

Under Section 2840 of the same code, a surety is exonerated "in like manner with a guarantor". We submit that these sections state the recognized rule of the common law. The court will not inquire whether Mr. Axman's obligation was altered to his detriment, or to his advantage; the sole test is whether "the original obligation of the principal is altered *in any respect*". Beyond any question Axman's obligation was altered here, if it continued at all after the change.

In the case of *U. S. v. Freel,* the question of the effect of a change in a similar contract was passed on in the Circuit Court, the Court of Appeals, and the Supreme Court, in each of which it was held that the surety was released.

The contract in the Freel case was to construct a dry-dock, at the navy yard at Brooklyn, "at some point on the water line, to be thereafter selected". By a later agreement in consideration of additional payments, the location was changed to a point not on the water line, but sixty-four feet inland.

The authorities were very fully considered by Judge Thomas in the Circuit Court, and the conclusion reached that such a change released the sureties whether it were for their interest or not. The decision was not based on any ground of possible detriment, etc., but on the express ground that

> "the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract.
>
> "He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract."
>
> *U. S. v. Freel,* 92 Fed. at 306-307.

The agreement in this case to deposit spoil behind a certain line near Pt. Pinole "at a point to be designated", is obviously identical in kind with the contract in the Freel case to erect a dry-dock at a point on the water line, to be thereafter selected. The change in location—to some point not on the water line—was held to release the sureties, in that case; the change in the place of deposit—to a point entirely away from Pt. Pinole—is strictly analogous here, and certainly has the same effect both as to the surety and as to the contractor himself.

The decision in the above case was affirmed by the Circuit Court of Appeals, which said that it was self-evident that the new contract "altered the requirements of the original contract in matters of substance" (*U. S. v. Freel,* 99 Fed. 239), and by the Supreme Court, which said:

> "The proposition that the obligation of a surety does not extend beyond the terms of its undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous

> cases in England and in the state and Federal Courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case" (92 Fed. 299).
>
> *U. S. v. Freel,* 186 U. S. 309; 46 L. ed. 1177.

That the surety on such a contract as this is released even by a mere waiver, by the Government, of part of the work, was decided in *U. S. v. Corwine,* 1 Bond. 339, Fed. Cases 14871, a very similar case in which it might well have been contended that the change was indeed "to the manifest ease" of the defendants. The contract there was to dredge and keep open a channel twenty feet deep. The Government accepted a channel eighteen feet deep, thus waiving part of the work. It was held, however, that as the sureties had never agreed to keep open an eighteen foot channel they were discharged.

> "The United States waived that part of the contract which specified the depth of the channel, and accepted the work with a channel of less depth. The sureties are in no sense parties to this arrangement, and therefore not bound by it."
>
> *U. S. v. Corwine,* 1 Bond. 339; Fed. Case 14871.

So here, Axman never became a party to any arrangement to waive the provision for impounding, and accept the work without it. The principle of the case is simply that a liability to dredge and keep open a channel of specified depth is not a liability to dredge and keep open a channel of different depth.

So, here, a liability to pay for dredging a channel and depositing the spoil in a specified place is not a liability to pay for dredging a channel and transporting the spoil somewhere else.

THE CHANGE WAS DETRIMENTAL AND NEW OBLIGATIONS WERE IMPOSED.

However, *even if the deposit of spoil were only an incident*, and an independent part of the work which might be waived, this could not give a right of recovery here. This was a provision highly beneficial to the contractor. The contract required that the channel be kept open until completed; the secure impounding of the material was the means of so doing. Colonel Heuer would not allow the spoil to be deposited even in the slack water adjoining the bulkhead, for fear it would flow back into the channel (R. 147). The contractor never undertook that the work could be done at the price specified, if the spoil were merely dumped in the bay channel itself, where the tides could carry it back to the excavation; but that was what the Dredging Company agreed to do, at the price it charged for its work. The Corwine case seems conclusive here—where a contractor, and his surety,

> agreed to keep open a channel under certain conditions, the Government cannot change the conditions and still hold them liable.

Apart from this, however, there is another fundamental reason why this change is not "to the

manifest ease of the defendants". *The change imposed new obligations.* Neither Axman nor his surety ever agreed to pay for transporting material to "The Sisters"—five miles across a windy bay—depositing it there; and taking measurements to prove that the top of no pile was within forty feet of the surface. The cost of all this was included in the Dredging Company's bid, and in the amount paid it, for which recovery is sought here. Can it be said that it is self-evident that the surety could not be harmed by this? There is nothing in the record to show that the Dredging Company's contract was on "more favorable terms" as to the place of depositing the spoil. On the other hand, the evidence is that San Pablo Bay is rough and windy and subject to heavy storms (R. 129). The place of impounding was from 1½ to 2 miles from the dredging site (R. 78); the place of deep water deposit was 5 miles away (R. 99). But whether the deposit of spoil at "The Sisters" was easy or difficult would be immaterial; Axman and his surety never assumed any obligation to pay for it. At the very utmost, *if* the Government could have waived the whole provision as to impounding, it could not charge the contractor for any work that was substituted therefor, *but only for the cost of the dredging.* Even if the Government could waive the impounding, therefore, it could not recover for any part of the expense of operating the Dredging Company's scows, tugs, dump barges, etc., engaged in carrying spoil to "The Sisters", making

measurements, etc., or any expense except that of the dredger itself. But its bid included all this; there is nothing at all to indicate how much of the expense was for dredging, and what proportion of it was spent for transporting and depositing.

Plainly Axman never assumed any liability for the cost of transporting spoil to "The Sisters", and a waiver of something else could not impose it on him.

The contract also included redredging to remove any filling that might occur during the time the second contractor was engaged in the work, including any filling in that might occur between July 3, 1905, the date for completion under Axman's contract, and August 19, 1906, the date for completion under the second contract. Such redredging was necessarily much more expensive than the usual dredging, as the material to be paid for—that which lay above grade plane—would in all probability be small but the amount necessary to be removed would be much greater; this is because of the construction of the dredger buckets employed in such work, which sink several feet in the mud each time they are lowered, and excavate five to six feet deep even if there is only one foot, or a few inches, above the grade plane, to be removed (R. 128). This expensive redredging was necessarily considered by the bidders on the second contract, and must have increased the price per yard at which they bid. And apart from the price it also increased largely the amount of work which had to be done in the limited time

allowed. This redredging of a year's silting from part of the channel was work not included at all under Axman's contract.

A surety's contract cannot be

> "split into parts so as to be his contract to a certain extent and not for the residue; he is either bound in toto, or not at all."
>
> *Brandt on Suretyship,* at page 812,

and the same rule applies here to Axman's indemnity agreement to pay the cost of completion. Even if his liability could be so "split into parts" there could be no recovery here, as there is nothing to show how much of the price paid the second contractor was for the new work not included in Axman's contract.

The whole matter comes back, of course, to the proposition that such a change in the principal's obligations releases the surety. This court, the highest English tribunals, and the ruling cases in our state courts lay down a rule which is unassailable, as far as a surety is concerned, and which, as we have already pointed out, applies equally to the reservation of rights against the contractor under drastic provisions for annulment, which are in the nature of a forfeiture, and under which the contractor is in effect made a guarantor or surety for some one else.

We submit that counsel for United States wholly failed to show error in the ruling of the Circuit

Court of Appeals that the change made in letting the Dredging Company contract was a material change, and that the Government did not proceed to complete the contract and to do *the* work Axman left undone, and therefore cannot recover.

THE CONTRACT DID NOT AUTHORIZE SUCH CHANGE.

Another proposition advanced by plaintiff's counsel, however, is that the right was reserved to the Government to make such changes as might be necessary or expedient to carry out the intent of the contract (p. 7). This contention seems based on a misapprehension of the contract provisions.

The contract *forbids* the making of any changes that will either increase or decrease the cost except with the consent of the contractor, in writing (R. 63), and prescribes the one method by which changes can be made even with his consent—that they "must be agreed upon in writing by the contracting parties," and the agreement approved by the Secretary of War (R. 63). Under these provisions no recovery can be had here.

The provisions here in question are:

> "If at any time during the course of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material, as would either *increase* or *diminish* the cost of the work then such change or modifica-

> tion *must be agreed upon in writing by the contracting parties*, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War."

This is not a case, therefore, where the Government had the right to change the work to be done, without the consent of the contractor; nor is it a case where the contractor or the surety ever agreed to any change. The changes made were certainly "of such character and quantity as would either increase or diminish the cost of the work". The making of such change, therefore, unless agreed upon in writing by the contracting parties (Axman and Heuer), was in direct violation of the provision.

The provision of the specifications as to the right to make "minor changes" does not conflict with the above; if it did the contract provision, above, would necessarily control as it is the later in date and the main substantive agreement of the parties. But there is no conflict between the two as the provision referred to concerns only "minor changes" and the obvious intent is only to provide that no extra charge shall be made by the contractor for such changes. Moreover, the wording of said specification expressly makes it subject to the above paragraph of the contract in providing that no increase of cost shall be allowed "except as provided in the form of contract to be entered into"(R. 81); and when the

contract was entered into the method there "provided" was that above set forth, that any change involving increase (or decrease) of cost must be agreed upon in writing. The change now under discussion did increase the cost, and is governed by the contract provision.

A provision of this sort, prescribing how changes may be made, is strictly construed.

The effect of a provision allowing changes to be made in the work—very similar in its terms to the one in this case—was passed upon in *U. S. v. Freel,* 92 Fed. 299; 99 Fed. 239; 186 U. S. 309; 46 L. ed. 1177, in which the provision was strictly construed and the changes held to be unauthorized.

The contract there was to construct a drydock, at the Brooklyn navy yard, "at some point on the water line, to be thereafter selected". It contained a provision that changes in the plans and specifications might be made, by consent. By a supplemental contract, the location was changed to a point 64 feet inland. The Circuit Court, Circuit Court of Appeals, and Supreme Court, in turn, all held that the provision as to changes was to be interpreted strictly, and that as the specifications did not include the location of the work, changes in that were not authorized. In that case, as the contractor consented to the change, the point was raised only by the surety; but here the contractor did not consent.

In the Freel case, as pointed out by this court, there was not only a provision in the contract allow-

ing for changes, but an express provision that such changes would not release the surety. There is no such provision here. But even in the Freel case the Supreme Court doubted whether the contract warranted "so wide a departure from the plans and specifications" as were made by another supplemental agreement changing the size of the dock and extending the time of performance.

The rule has been laid down in many cases that under such provisions as the above changes can be made only in the manner prescribed, and that if they are made otherwise all liability is waived.

When the contract is annulled, the parties' rights are fixed. How can one afterward tinker with it so as to impose new burdens on the other? It requires two parties to make a contract; it takes two, also, to modify it. The United States had agreed with Axman that the requirements of the contract would not be varied except by his consent; having then undertaken to complete his work, it would certainly not be at liberty to change those requirements as it saw fit, and still hold him for the cost of the work.

The provision in the Axman contract that changes must be agreed to in writing is analogous to the requirement of building contracts that a certificate shall be obtained from an architect or an engineer. Both contractor and surety are entitled to insist on this provision, after the annulment or abandonment of the contract.

The case of *American Bonding Company v. Gibson County,* 127 Fed. 671, like the present one, was

based directly on a provision allowing the county to "complete the work" after annulment. The provision required that the cost of the work be audited and certified by the architects—just as the present contract requires that any changes be agreed to in writing by Axman, and that the cost be set forth in the agreement. The certificate, in that case, was not obtained "and no reason was given for its non-production except that it was not necessary, because the contractors had abandoned the contract". The court held:

> "If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist on its observance before being held responsible. * * *
>
> "Under the contract, *the contractors and their surety* had a right to insist on a certificate from the architects before paying the county for work done after it took over the job * * *."
>
> *American Bonding & Tr. Co. v. Gibson County*, 127 Fed., at 673.

The following, from the same decision, is also strikingly in point:

> "In case the contractors failed to finish the work, the owner might take over the job by complying with certain provisions. But if he did he was obliged to *complete the work in accordance with the specifications*, and before he could collect what it cost beyond the contract price he had to have the certificate of the architect showing the expense and damage incurred" (p. 674).

The point here is not a technical one as to whether or not some certificate was obtained, but the essential one that the work was substantially changed without Axman's consent, after the United States had stipulated that it would not be changed except with his consent.

Under this provision the cost of the substituted work was required to be stated in writing in advance by agreement of Axman and Heuer. We contend that we are not liable at all for the cost of the work involved in the change, but at all events such writing, signed by Axman, is the only way of showing its cost.

Of such a provision as to measure of liability this court has said:

> "The contract is a law between the parties in this respect, as they expressly agree that the amount of the service shall be established by the certificates of the commanding officer. * * *
>
> "Is not this part of the contract as obligatory as any other part of it, and if so, is not the obtaining of the certificate a condition precedent to the payment of the money?
>
> "Where the parties, in their contract, fix a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part to be done to carry it into effect."
>
> *U. S. v. Robeson*, 9 Peters 319; at 327; 9 L. ed. 143.

There was "a change or modification in the project". Whether it increased or diminished the cost

is immaterial, under the express terms of the provision. In either case the written agreement of the parties is made essential, and is made the only measure of the amount to be paid. In the absence of such writing there can be no recovery.

These decisions make it plain that such a clause is interpreted strictly, and that it cannot be extended to changes that are not brought within its terms, even where the contract was let on the theory that changes in the work to be done might become absolutely necessary. Where, as here, the consent of the contractor is required, but the change is made without it, he is certainly released, as such a change is necessarily not within its terms.

The question is not whether the government would have had to do the work exactly and precisely as required by the specifications. The change made was material and substantial. The identity of the work was changed; the things to be done under the second contract were not the things contemplated by the first. The rule is well stated in *Reissans v. White*, 106 S. W. 607:

> "The one class of cases, those dealing with mere permissive deviations in acts or omissions of performance, * * * turn upon the question of the materiality of such deviations, and the inquiry directs itself to ascertain whether or not the deviation was substantial or insubstantial * * * The other class, * * * where the original contract has been departed from, not merely a permissive departure, however, but a departure made in conformity to one or more subsequent express or implied agreements, turn

> upon the question whether or not the identity of the surety's contract has been destroyed by the principal parties adding to or deducting one or more new terms or stipulations therefrom without his consent, and if so the surety is discharged. In such cases it is wholly immaterial whether the surety's risk is increased or diminished. The mere destruction of the identity of the contract without the surety's consent is sufficient to operate his release."
>
> *Reissaus v. White*, 106 S. W. 607.

The change there was made at the request of the contractor. By it a skylight differing from the one specified was installed; it involved no extra expense. It was, said the court, "a concession made to him, without the consent of the sureties". But

> "It nevertheless ingrafted a stipulation upon the contract between the original parties which operated to change its terms from those assumed by the sureties at the time of executing the bond."
>
> *Reissaus v. White*, 106 S. W. 607.

While the above case was as to the liability of a surety after changes had been made without his consent, the same rule must apply in favor of the contractor where his consent was necessary and where changes made without it "change the terms from those assumed by (him) at the time of executing the (contract)".

In short, the change made here was in no way authorized by the provision of the contract relating to changes, and in fact was in violation of that provision, and that the annulment of the contract does

not in any way affect the right of the contractor to insist that he is not liable for the cost of the change in the absence of a written agreement by himself specifying the change, the reasons for it, and the cost.

THE MCMULLEN CASE.

In view of the importance given to this case in the brief for the United States we deem it proper to consider it somewhat in detail for the purpose of pointing out—even at the risk of elaboration—the absolute unlikeness of the issues of that case and the case at bar.

The *McMullen* case arose on the contractor's utter failure to complete the work within the time limited, or a year or more thereafter, and its entire abandonment of the contract. The *Axman* case arose on the Government's taking the work out of the contractor's hands almost at the start, when less than one-third of his time had expired, and he was working with the utmost diligence. The *McMullen* case sought recovery of damages for the breach. The present case seeks payment under a contract provision whereby the work was to be completed at the contractor's expense in case of annulment. In the *McMullen* case the first contractor had figured on both methods of deposit, and the contract expressly provided for the use of both methods of deposit, at the same price per yard for each. In the case at bar one method was rigidly prescribed; not only was the

other not mentioned, but any method other than the one prescribed was absolutely forbidden. Under the *McMullen* contract the contractor was to follow one method or the other, as ordered, and the Government expressly reserved the right to change the amounts disposed of under each method to any extent; under the Axman contract no change of any sort could be made without Axman's consent (except, perhaps, "minor changes"). In the *McMullen* case the relet contract was, expressly, a contract to continue with work under the original contract, under its specifications, which were attached as the specifications for the new contract; in the *Axman* case the new contract was an independent contract in which the work to be done was independently described, under specifications materially different from the work to be done under the original contract. Finally, in the *McMullen* case all of the work actually done under the relet contract was work which was provided for in the original contract; in the *Axman* case, part of the work done under the new contract was work *not included* in Axman's contract at all, and which he could not have been required to do, and, in fact, was prohibited from doing. In short, the cases are wholly unlike, with the unlikeness of complete contrast, so that the reasoning which held the defendants liable in the *McMullen* case leads to the contrary holding here.

While the decision in the *McMullen* case and the contract and briefs in the present case both allude to "completing the contract", the meaning in that

case and in this is entirely different. In the *McMullen* case the argument was that the relet contract did not contemplate *completing* the work; that is, completing the *project* of forming a deep-water basin in the river. In the present case the point is as to completing *the work*—that the work provided for by the second contract was not *the* work, but *other different* work.

In view of the discussion herein of the facts of the present case and the law applicable thereto as we see it, the above statement of the facts of the *McMullen* case might of itself serve to show the inapplicability here of the rule announced there. Consideration of the *McMullen* contract and what was done in connection with it, and of the contentions made and passed upon in the case, will, we believe, prove beyond question the truth of our introductory statement that the case was decided on the basis of the features wherein it *differs* from the present case, and that it is wholly inapplicable here as an authority for the United States.

The essential clause of the *McMullen* contract (as to the work to be done) provided for

> "the construction and completion in all respects of the dredging at said naval station in strict accordance with, and subject to, all the conditions and requirements of the specifications," etc., etc., "for the sum of fifteen cents per cubic yard for items 1 and 3 and ninety-nine cents per cubic yard for items 2 and 4", etc.
>
> (Record, *U. S. v. McMullen*, p. 6.)

The specifications provided:

"1. GENERAL DESCRIPTION.—The channel of the Beaufort River shall be increased in width and depth by dredging, so as to form a deep water basin opposite the station. *If required, a part of the material dredged shall be deposited in the station;* the remainder shall be disposed of elsewhere, as may be allowed by the engineer of the district (p. 8).

"2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated as about 1,000,000 cubic yards. The quantity is approximate only, and may be increased or diminished as the funds allotted for the work may allow or require (pp. 8-9).

"6 DEPOSIT.—The Government proposes to increase the area of the station by purchasing adjoining lands; therefore *a part of the material shall be deposited on and within the boundaries of the station* as they now exist, or may be in the future, at points to be designated by the commandant. The quantity required to be deposited on the station is about 49,000 cubic yards, but *the Government reserves the right to increase or decrease the amount to any extent.* Material deposited on station shall be leveled and graded" etc., etc. (p. 9).

"32. BIDS.—Bidders will make separate and distinct offers for each of the following items of work: Item 1.—A price per cubic yards for earth dredged and deposited on the station, leveled and graded. Item 2. A price per cubic yard for rock dredged and deposited on the station, leveled and graded, if required. Item 3. A price per cubic yard for earth dredged and not deposited on station. Item 4. A price per cubic yard for rock dredged and not deposited on station" (pp. 11-12).

The contractor thus fixed a price (15 cents) for each yard of earth whether deposited on shore or

in the water (items 1 and 3) and similarly a price of 99 cents for each yard of rock, whether deposited one way or the other (items 2 and 4), and was bound to deposit on the station any amount, large or small, that the Government required.

The contract provision as to annulment and damages was:

> "If the (contractor) shall fail in any respect to perform this contract, etc., it may, at the option of the United States, be declared null and void, without prejudice to the rights of the United States to recover for defaults herein or violations hereof, etc. (also, provision for liquidated damages equal to penalty of bond) (p. 7).

Under the contract the contractor was to complete the work February 28, 1899. Just prior to that date the Secretary of the Navy extended the time to December 30, 1899. We quote from the court's statement of facts:

> "But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. * * * Finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 21, 1901, the Navy Department declared the contract void" (p. 468).

At the time the requested permission was granted no work had been done for nearly a year; no more was ever done. The work had been abandoned for over two years when the contract was annulled. The notice of annulment followed the contract provision as to reservation of rights. It stated that

the United States declared the contract null and void *"without prejudice to their right to recover for defaults therein or violation thereof"* (p. 53).

Such reservation obviously covered the right to recover damages for non-performance, which had fully accrued. The brief for the United States so argued:

> "The contract had been broken, and the contractor was liable for the breach" (p. 20).

and the opinion of the court so pointed out:

> "At the time when the notice was given, it was merely a ceremony to mark the point of default as a preliminary to employing some one else. The obligation of the contract, *so far as applicable to a case of default,* remained in full force" (471).

After annulment the Government let a contract to another contractor the basic provision of which was that he would provide all labor, etc.,

> "for the completion in all respects, of dredging and removing seventy thousand cubic yards, more or less, of material from the waters of said naval station * * * in strict accordance with and subject to, * * * the plans and specifications appended hereto and forming part of the contract * * * the work to be done being that contemplated in items 3 and 4 of paragraph 32 of said specifications" (R. 45, McMullen),

those items providing for the removal of earth or rock, and the deposit thereof in deep water. The very first provision of said specification was

> *"It is the declared and acknowledged intention and meaning to secure the completion of the work of dredging a channel * * * according to plans and specifications which were attached to and formed a part of a contract between the New York Dredging Company, * * * and the United States, * * ** said contract having been declared forfeited", etc. (p. 17).

The specifications next stated the work completed and appropriation available, and set out a *reprint* of the original specifications as the specifications to govern the work under the new contract.

A clear method of contracting for the continuance and completion of a contract could hardly be devised. On completion of the work the United States brought suit to recover the damages sustained through the first contractor's failure to perform. The main contention of the sureties was that the original extensions of time had released them. Apart from this they also contended that they were released by the contract having been changed when the contractor's request as to dumping in deep water was granted and also that they were released because the *work* had not been completed—meaning thereby the entire project of approximately 1,000,000 cubic yards, contemplated as possible when the first contract was let, to wit, creating a basin thirty feet deep by widening and deepening the channel of the river.

The first contention, as to extension of time, obviously does not concern us here.

The argument as to change of work was so insubstantial as to be almost impalpable. Admitting, as they had to, that the Government had the option to order the contractor to deposit all the spoil on shore, counsel for *McMullen's* sureties nevertheless contended that there was a change—that a provision that the Government *might* require something, at *its* option, is different from a provision that it would require it. As a matter of syntax it is different; but as to the obligations it imposed as to doing that required something it is precisely the same. And there could be no possible difference to the contractor who, as in the *McMullen* case, had agreed to do the work in either way at the same price—e. g., to dredge rock and deposit it on land, if required, at ninety-nine cents per cubic yard, and also to dredge rock and deposit it in deep water, if required, at ninety-nine cents per cubic yard. If anything further is needed to show the utter absence of any "similarity of issue" as to this matter of change of place of deposit, it is surely supplied by the following statement of the contention in the *McMullen* case as set forth in the brief itself in that case:

> "Although the original contract did provide that the amount to be placed on shore could be increased or diminished by the United States, this provision did not permit that the United States should by a binding agreement agree to accept less than what New York Dredging Company has contracted to do. In other words, while not requiring any of the material

> to be placed on shore could not release the sureties; contracting by the United States and New York Dredging Company, to change the work so that none could be required to be placed on shore might release the sureties. Under the original contract, the United States had the right to have the material placed on shore. United States need not have required any of it to be so placed to comply strictly with contract. But after the change in the contract, the United States did not have the right to have all the material placed on shore. To that extent the contract was changed" (Br. p. 65).

Can it be said that such a contention has the remotest resemblance to the argument of the defendants here, or that a decision on it has any relevancy at all to the question at issue in this case? We submit that it cannot.

The "change" there was utterly unsubstantial and as to something on which the contractor could have been compelled to submit to a change at any time. As the court says:

> "The Government reserved an absolute right of choice in this regard" (p. 472),

which clearly distinguishes the case from the present one, in which the Government, instead of reserving such right, relinquished any right of change by agreeing that none could be made without Axman's consent.

An equally clear distinction between the cases is that the contention and therefore the decision in the McMullen case (so far as the latter can be con-

sidered to have passed the matter of change at all) did not involve any question whatever as to variance between the first and the second contract. The second contract there did not make a change in the work at all and was in the strictest sense a contract to proceed with the very work which was required by the terms of the first contract at the time it was anulled. The ruling on the point is therefore entirely inapplicable here, for at least two reasons: firstly, the contract was, expressly, to do the work left undone; secondly, there was no obligation on the Government there, as there is in this case, to complete the contract, that case having been brought to recover damages after breach, and not involving any issue as to how a change in the work to be done affects the right to recover, after annulment, for completing a contract.

The other contention was that the Government had not completed the first contract as it had alleged. The point was not as to the identity of the work as here, but was merely that the first contract was that the channel would be deepened to a specified depth, and widened—that it was to be "increased in depth and width * * * so as to form a deep water basin" and that the area would be dredged "to a depth of thirty feet below low water" —and that the Government had not contracted with the second contractor to dredge the channel to that depth or so as to form such basin, but merely to dredge 70,000 yards, more or less, at a stated price

per yard (see p. 85, p. 89, of Brief of Defendants in Error, *U. S. v. McMullen*).

There is no reference to this contention in the brief for the United States; but in another connection that brief points out that the first contract was really for *so much dredging as the appropriation would pay for;* and in fact the second contract was similar, the proposal and specifications setting for the unexpended amount of the appropriation (about $87,000) available for the work; the price $1.25 per yard fixed the amount "70,000 yards more or less" (see p. 29 of Brief for United States in *United States v. McMullen*). The above contention and circumstances are evidently what the court had in mind in saying:

> "The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, *that is, to have made a channel of a certain depth,* does not impress us. The first contract was for certain work for a certain object, *but limited and subject to change as the appropriations might require.* The second was for the same on the same plans and specifications, the only difference being in the parties, the price and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. *Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform"* (pp. 471-472).

In other words the court pointed out that the contentions that the Government had not completed

the work was *not well founded in fact;* that while the Government perhaps had not completed the project and attained the object of the contract,—the proposed improvement—it had, by the second contract, gone on with and completed *the work,* that is, the doing of such dredging as the appropriation would pay for. The contention and the decision on it have absolutely no bearing on the matter of *identity of work,* which is the point of issue in the case at bar.

We may add that a final distinction between the two cases appears in the last words above quoted—"so long as the work done * * * is work which the first contractor had agreed to perform". In the one case the contractor had agreed to deposit the spoil in one place or the other as ordered, and the method imposed on the second contractor was one which the first therefore had agreed to; in the other case much of the work done under the second contract had never been agreed to under the first. We do not understand, however, that the sentence referred to (dealing as it does with the peculiar question of whether the *object* of the contract has to be attained in fixing damages after breach) has any applicability to the question in hand as to fixing liability for excess cost of completion in case of annulment.

The reference to the change in the place of deposit having "diminished the cost" seems to have been by inadvertence. The matter of comparative cost was not in the case at all. The first contractor had made the same price for both methods of deposit; the second had bid only on one method. No testimony on comparative cost was given.

—change of place of deposit, completion of work, etc.—and because the importance attached to the decision of the learned Solicitor General seems to indicate that the decision itself, standing alone, might be misunderstood as deciding matters which in fact were not at issue in the case. Consideration of the record shows, as we have pointed out, that the questions relating to "change" and "completion" in that case was absolutely different from those at issue here.

The decision itself, apart from the question of extension of time, really holds

1. Giving the notice of annulment after breach did not affect the liability for *damages*, because that liability had already become *fixed by the breach*, and the notice of annulment expressly *reserved the right to recover damages*. None of these elements is present in the case at bar.

2. The point as to the work not having been completed because the general object was not attained is not well taken because the second contract, let on the same specifications, was for *exactly the same work as the first*, that is such work as the appropriation would pay for. This identity of contracts is absolutely lacking here, the North American Dredging Company contract being entirely independent of the Axman contract and for different work.

3. The change in place of deposit was immaterial as the Government reserved *an absolute right of choice in the matter*—the contrary being the fact in this case, where the Government had no choice and could not make such change without Axman's consent.

4. That the general object was not attained is immaterial because the question is not as to general object but whether all the work done by the second contractor was work *for which the first had agreed to be liable.* Here a great part of the work of the second contractor—transporting, measuring, redredging—had never been agreed to by Axman.

On every point the decision is expressly and essentially based on the presence of an element that is lacking here, and on every point the reason of the decision requires a contrary ruling here.

Such is the authority—the one case—on which the Government relies in this matter. **We submit that it is a controlling authority against the Government's contention.**

Conclusion.

We regret that we have had to extend this brief to such length. It has seemed to us that our duty to the estate of Mr. Axman, and our duty to the court, required us to present fully the argument against what we consider to be an improper claim, unfounded either in law or justice. Yet, as we have written, it has seemed as if all the argument is perhaps unnecessary; that behind all the discussion there is one central vital, unanswerable *fact* that lifts the case clear of all the rules of law and that apart from legal reasons altogether necessitates a judgment that Axman did not die a defaulting contractor and did not cause one cent of loss to the

United States in the matter directly or indirectly—**the fact that he himself offered to do, without extra charge, the very work for which the Government paid $65,000 additional to another** (Br. for United States, p. 3; R. 126, 127). *He* did not cause or bring about the expenditure of that money; *he* stood ready and willing to save the Government from any loss. That fact in our judgment constitutes a conclusive answer to any claim that the Government paid out the money either *necessarily*, or *properly*, or *through any fault of Axman*, or that the amount paid was *reasonable*, and a conclusive defense to the attempt to enforce against the estate of the contractor a **liability for $65,000 as the cost of doing work which plaintiff refused to allow him to do for it for nothing.**

Respectfully submitted,

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FRANK W. AITKEN,
Of Counsel.

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ARGUMENT.

TABLE OF CASES CITED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 242.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR AMERICAN BONDING COMPANY OF BALTIMORE, DEFENDANT IN ERROR.

INTRODUCTION.

This suit is to recover damages for breach of a contract by Axman to dredge for the United States a channel in San Pablo Bay, California, the contract having been annulled by the United States. When it was first tried in the Circuit Court for the Northern District of California it resulted in

a judgment in favor of the United States of America, plaintiff, for $39,902.59 (Tr. p. 66). On writ of error to the Circuit Court of Appeals for the Ninth Circuit this judgment was reversed and the cause remanded for a new trial (Tr. p. 68). The opinion of the Circuit Court of Appeals is made a part of the Record. On the new trial the Circuit Court for the Northern District of California, in pursuance of the opinion of the Circuit Court of Appeals directed a verdict in favor of the defendant (Tr. p. 150). On writ of error to the Circuit Court of Appeals this judgment was affirmed (Tr. p. 165). The case is now before this Court on writ of error to the Circuit Court of Appeals for the Ninth Circuit (Tr. p. 177).

In order to get the facts clearly before this Court, we shall first take up the contract and what Axman did under it prior to the annulment. We shall then give a brief statement of the issues and the nature of the damages sought to be recovered, and shall follow this with a statement of the evidence introduced to prove damages.

Statement of Facts.

Under date of August 25th, 1902, the United States called for bids for dredging in San Pablo Bay, California (Tr. p. 73). Under date of September 30th, 1902, Rudolph Axman submitted his proposal to furnish all the plant, labor and materials for dredging (Tr. p. 83). In pursuance of this proposal a written contract was entered into on November 21st, 1902, between Axman and the United States, contracting, through Colonel W. H. Heuer (Tr. p. 84). By this contract Axman agreed to do such dredging in San Pablo Bay, California, as may be required by said Heuer, in accordance with the specifications, for the sum of 11.44 cents per cubic yard (Tr. p. 85). The specifications (Tr. pp. 73-

82) were by the terms of the contract made a part thereof. Axman as principal and the American Bonding Company as his surety entered into a bond, running to the United States in the penal sum of $50,000, dated November 21st, 1902, the condition of which is, that if Axman shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by Axman to be observed and performed, according to the true intent and meaning of said contract, as well as during the period of extension of said contract on the part of the United States as during the original term of the same, then the obligation to be void, otherwise to remain in full force and virtue (Tr. p. 117). The following are the important paragraphs of the specifications:

> 35. "The shoal to be dredged is in San Pablo Bay, California, is about five miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point and is distant 1¼ to 1½ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet."
>
> 36. "The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet; a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the South shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer Officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer Officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."
>
> 56. "The location of the work to be done will be fixed in advance by the Engineer Officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascer-

tained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys, or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 53."

37. "The depth of cutting will vary from 0 to 11 feet. The mean low water depth to be obtained under this contract is 30 feet. The first cut will be made about 100 feet wide throughout the length of the shoal. All material above a depth of 30 feet must be removed. Payment will be made, however, at one-half of full contract rates, for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet. Side slopes of 3 horizontal to 1 vertical will be permitted along the line of the proposed completed channel."

38. "Material dredged outside the designated lines of excavation, below the depths provided in paragraph 37, or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,721,000 cubic yards, more or less."

40. "The part of area available for the deposit of material from scows has an average width of about ¾ of a mile. Its distance from the site of dredging varies from 1 to 2 miles, the location of the place of deposit, the depths of water therein, and the location of the dredging, are shown on maps on file in this office."

31. "The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months after the date of commencement."

30. "Payments will be made monthly, subject to the provisions of paragraph 46 of these specifications. A percentage of ten (10) per centum will be reserved from

each payment as provided for in paragraph 45 of these specifications."

45. "With the funds now available, and such as may hereafter be appropriated, payments, less than ten per centum, will be made monthly for all material removed from the cut above the grade plane, provided a satisfactory rate of progress, as described in paragraph 46 of these specifications, has been made.

"The ten per centum deductions will be made monthly until 1,400,000 cubic yards of material measured in place have been excavated, accepted and paid for; thereafter, monthly payments will be made in full without further deduction, provided satisfactory progress has been maintained. The retained percentages will not be paid until the satisfactory completion of the contract."

46. "The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced."

50. "All material will be paid for by the cubic yard, measured in place. Price bid shall include all expenses of transportation, construction and maintenance of bulkheads, and disposal of the material as above provided."

34. "All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information, and will not be responsible for the safety of the employees or material used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that the proposals are based upon thorough understanding of its character. Intending bidders are urged to visit the localities of the work and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession will be made for any lack of informa-

tion on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materails and appliances of every description, and for doing all the work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work."

Paragraph 3 of the contract is as follows:

"The said party of the second part shall commence, prosecute and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications."

The contract by paragraph 15 thereof is subject to the approval of the Chief of Engineers, U. S. A. The contract was approved by General G. S. Gillespie, Chief of Engineers, U. S. A., December 27th, 1902 (Tr. pp. 65, 87); Axman was notified of such approval under date of January 3rd, 1903 (Tr. p. 88), and commenced work February 24th (Tr. p. 89).

Even after the execution and approval of the contract, however, there were certain matters to be determined by Colonel Heuer before the terms of the contract became definite and fixed. One was the designation of the dumping ground, in accordance with paragraph 36 of the specifications, and the other was the designation of the outlines of the channel to be dredged, in accordance with paragraph 56 of the specifications.

While Colonel Heuer testified that he designated the place where the bulkhead was to be built (Tr. p. 116), yet the point where the bulkhead was to be built was actually designated by Mr. Demerit, one of Colonel Heuer's assistants, Axman requesting at the time that the line or direction of the bulkhead be changed, so that it would extend out towards deeper water (Tr. pp. 88 and 145). The point from which

the bulkhead started was not the extreme outer end of Pinole Point, but very near the outer end (Tr. p. 114). Axman built a bulkhead 2400 feet long, consisting of two arms, one of 1800 feet and one of 600 feet (Tr. p. 114). The outlines of the channel were marked prior to the commencement of the work (Tr. p. 91). When the location of the bulkhead was finally determined and the channel to be dredged staked out by Colonel Heuer, the contract became a contract to dredge a channel within certain fixed lines of certain dimensions and to deposit the spoil in a certain fixed place behind bulkheads to be built by Axman, and for this work Axman was to receive 11.44 cents per cubic yard of material dredged measured in place.

Paragraphs 39 and 47 of the specifications are as follows:

> 39. "All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer Officer in charge."
>
> 47. "The contractor will be required to provide and maintain such a plant as the Engineer Officer in charge shall deem necessary for the vigorous prosecution of the work. The plant shall be at all times subject to the inspection and approval of the Engineer Officer in charge. If deemed insufficient or inadequate, the contractor will be required to increase or change the plant to the extent found necessary. All plant and appliances must be kept in good condition in every respect. The contractor will give immediate notice in writing to the Engineer Officer in charge of the arrival upon or withdrawal from the work of any portion of his plant; provided, however, that the number of dredges may not be diminished at any time without first obtaining the consent of the Engineer Officer in charge."

Colonel Heuer was the engineer officer in charge. Axman commenced work with the dredge Caledonia, two self-dumping barges and a steamboat used to haul the barges.

This plant was approved by Colonel Heuer. During part of the time Axman with the approval of Colonel Heuer, employed the dredge Oakland for the purpose of dredging a channel into the place of deposit and a sump in order that he might get his barges in behind the bulkhead, and to make room for dumping more material there and distributing it over the basin (Tr. p. 115). Colonel Heuer described the dredger Caledonia as a clam shell dredger, which would probably lift from 10 to 15 tons at one time, and when allowed to sink in the earth would go down from six to ten feet, depending on the nature of the bottom; so that when the contractor was dredging where the deposit of material was about one foot thick, that is, where the depth of the water was 29 feet and the bucket sank six feet, then the measurements would show but one foot, for which the Government agreed to pay in full and one foot for which the Government agreed to pay one-half, and would not take into account the four feet below. This dredger was also used by Axman's successor and during that time actually dredged on an average of 71,590 cubic yards monthly of paid materials (Tr. p. 117).

Axman worked from February 24th to June 24th, 1903, during which time he removed less than 100,000 cubic yards. On June 24th the dredger Caledonia was removed for repairs with the permission of Colonel Heuer. She was not returned until October 1st. During the time she was away there was no dredging done (Tr. pp. 92, 115). The reason why she was removed was to place in her another fleeting spud, in order that she could fleet against the strong ebb tide; although the dredging machine had the best fleeting device known at that time to the dredging science, the current was too strong for her (Tr. p. 129). Axman afterwards worked from October 1st to December 24th, 1903. During these nine months he removed 196,000 cubic yards, and during no month did he remove 100,000 cubic yards (Tr. p. 91). Ax-

man's explanation of this lack of progress was that the only way to do the work was the method he had adopted; that the dredger had a capacity of at least 100,000 cubic yards per month; that the barges drew about eight feet of water and these were towed from the dredger to the dumping ground by the steamer; that the greatest depth of water behind the bulkhead was four feet, and only a small area was that deep. The consequence of this was that the barges could only get behind the bulkhead at high tide, which occurred twice in every twenty-four hours, and thereby the work was retarded; that he tried using the dredge Oakland for the purpose of dredging a channel in behind the bulkhead, and of dredging a sump or hole into which to dump the material; that in order to remedy the difficulty he requested Colonel Heuer to allow him to dump on the north side of the channel or down at "The Sisters", at the same price and under the same contract. "The Sisters" was the place where the material was subsequently dumped, under the contract with the North American Dredging Company; that he first requested to be allowed to dump the material outside of the bulkhead and employ an additional clam shell dredger to lift it over. He also wanted to employ a suction dredger so as to spread the material over a large territory. Both of these requests were refused. He requested in October or November of 1903 to be allowed to dump the material at "The Sisters"; that Colonel Heuer said to him: "I will not allow you to dump any place else, and if you do I will not pay you a cent for anything;" that because he could only get behind the bulkhead at high water he got two additional barges of 1,000 tons capacity each; that sometimes he would only load the barges half full, so as to try and get behind the bulkhead; that by reason of the stormy weather the steamer could not handle the barges, and so he had to get a propeller boat to bring the barges over to the stern wheeler, but the propeller boat drew too much water to go behind the

bulkhead (Tr. pp. 126-130). Colonel Heuer testifies that probably twelve hours out of twenty-four the water was of sufficient depth to get behind the bulkhead (Tr. p. 147).

Paragraphs 4 and 5 of the Contract are as follows:

> 4. "If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties, or either of them, of the second part, and upon the giving of such notice all payments to the party or parties of the second part, under this contract, shall cease, and all money or reserve percentage due, or to become due, the said party or parties of the second part by reason of this contract shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done, and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise in accordance with law."

5. "It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restriction, or other unforeseeable causes of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work, or delivering the materials within the period required by the contract, but such waiver of the time and remission of the charges shall in no other manner affect the rights or obligations of the parties under this contract."

Paragraph 48 of the specifications is as follows:

"If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the Engineer Officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be

> due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into."

Under the terms of the contract, therefore, Colonel Heuer could have pursued one of these three courses for a failure to prosecute the work. He could annul the contract or extend the time for completion or employ additional plant at the expense of Axman.

Colonel Heuer testified in his examination in chief (Tr. p. 90), that he arrived at the opinion that Axman was not carrying out his contract, which required at least 100,000 cubic yards per month excavation, that Axman worked nine months and got out less than 200,000 cubic yards; that he acted under paragraph 4 of the contract because Axman was not proceeding faithfully and diligently to carry out the work.

Letters were sent Axman and the American Bonding Company, notifying them of the annulment under date of December 24th, 1903 (Tr. pp. 90 and 91). The one to Axman is in the following words:

> "I hereby notify you that the contract entered into by you with me on November 21st, 1902, for dredging in San Pablo Bay, California, is this day annulled, as provided for in paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications."

Issues.

The complainant and the amendments thereto will be found in Tr. pp. 2-5; 49-65. In it the contract and specifications are set forth in full, as is also the execution and delivery of the bond.

By paragraph 5 of the complaint the following is alleged: That Axman entered upon the performance of his contract and proceeded to do a portion of the work contracted for; that he did fail to prosecute faithfully and diligently or at all the work in accordance with the specifications and requirements of said contract; that he did refuse to complete or perform the work or any further part thereof; that he did abandon said contract and refuse to do the work or any part thereof; that Colonel Heuer annulled the contract; that he re-advertised the work; that he contracted with the North American Dredging Company to do the work left undone by Axman, and paid it the sum of $311,991.29; that the cost of the same work at the price for which Axman contracted to do it would have been $246,490.35, a difference of $65,500.94. Damages are claimed for this last mentioned sum against Axman and to the extent of $50,000 against the Bonding Company.

The defendants by their respective answers (Tr. pp. 14 and 32), not only specifically deny all these allegations of the complaint, but they allege that the work done by the North American Dredging Company was not the work that Axman had contracted to do. As there was no evidence to support the allegation that Axman had failed to prosecute the work at all, or that he refused to complete or perform the work, or that he abandoned the contract, and as the evidence showed that Colonel Heuer had annulled the contract, under the power given him by paragraph 4, because Axman had not dredged 100,000 cubic yards per month, and as the defendants admitted that the United States paid the North American Dredging Company $65,000 more than it would have paid Axman, had he completed his contract (Tr. p. 112), it is only necessary to discuss one issue, and it may be stated as follows:

Was the work re-advertised and was a contract made with the North American Dredging Company to do the work left undone by Axman?

In order to prove this issue the plaintiff proved that the contract was annulled with the assent of General Gillespie, Chief of Engineers, with instructions from him, as follows:

> "The work should be re-advertised and a careful account kept of any increased cost or loss and damage to the United States by reason of the contractor's failure to complete the original contract." (Tr. p. 89-90.)

The work was re-advertised and new bids opened on March 2nd, 1904. It was found, however, that the lowest bidder did not agree to dump the material behind the line extending from Point Pinole to Lone Tree Point, and while the other bidders agreed to dump behind the bulkhead the prices were extortionate. So all bids were rejected (Tr. p. 92).

The plaintiff then offered in evidence the contract between the United States and the North American Bonding Company, to which was attached the advertisement for sealed proposals, the bid of the Dredging Company and the specifications on which the bid was based.

This evidence was received over the objection of the defendants, the question of its admissibility being reserved (Tr. pp. 92-108).

It appears from this evidence that on April 21st, 1904, Colonel Heuer advertised for sealed proposals for dredging in San Pablo Bay (Tr. p. 93), and that the new specifications are the same as Axman's specifications, except in the following particulars:

Paragraph 36 of the new specifications is as follows (Tr. p. 98):

> "The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 2,700 feet, and either:
>
> "(*a*) To deposit the spoil as near the South shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be desig-

nated by the Engineer Officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the Engineer Officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract; or

"(*b*) To deposit the spoil in water exceeding 50 feet in depth lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide.

"Bids will be received for either place of deposit, but will not be considered for any other place of deposit than those specified, and bidders must distinctly state in their bid, in which place they propose to deposit the spoil. The right is reserved to award the contract, irrespective of price, for such place of deposit as may be considered most advantageous to the United States."

Paragraph 37 of the new specifications is as follows:

"A part of the channel near its southwest end, having a length of 8,000 feet, a width varying from 70 to 140 and a depth of 30 feet below mean low tide level, containing approximately 165,000 cubic yards, was dredged recently under a former contract which was annulled. The area over which dredging was done, which can be seen on a map on file in this office, will not require re-dredging unless filling occurs above the grade plane, and then only such material as fills above said grade plane before the completion of the contract will have to be re-dredged and deposited at the unit price per cubic yard, place measurement, mentioned in the new contract."

Paragraph 41 of the new specifications is as follows:

"In place of deposit (*a*) the part of the area available for deposit of material from scows has an average width of about ¾ of a mile. Its distance from the site of dredging varies from 1 to 2 miles.

> "In place of deposit (*b*) the deep part of the area available for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depth of water therein and the location of the dredging are shown on maps on file in this office."

By paragraph 31 of the new specifications the contractor was only given 23 months to complete, while Axman had 28.

While paragraphs 42 and 45 of the new specifications differ from paragraphs 41 and 44 of the old specifications, the difference need not be noted here.

So that under the new specifications it appears the new contractor was to base his bid on dumping the material either behind lines drawn between Pinole Point and Lone Tree Point or at "The Sisters", at which latter point Axman had requested that he be allowed to dump material, which request was refused by Colonel Heuer.

It further appears from the evidence that on May 24th, 1904, the North American Dredging Company bid only on depositing the material at "The Sisters" at the price of 14.48 cents per cubic yard (Tr. p. 104); that on June 21st, 1904, the new contract was entered into (Tr. p. 105); that it was approved by General Mackenzie, Chief of Engineers, July 19th, 1904 (Tr. p. 108), and that it is similar in all respects to the Axman contract, except that it provides that the spoil is to be deposited in the place of deposit (*b*) as described in paragraph 36 of the new specifications, which are made a part of it. The bid of the Dredging Company was the lowest received (Tr. p. 114).

To further prove this issue, the opinion evidence of six witnesses was offered (Tr. pp. 110-112, 114, 119-121) as to the fairness of the price paid the North American Dredging Company, and as to whether or not it would cost more to

dredge and dump the material behind the line drawn between Pinole Point and Lone Tree Point than to dredge and dump in deep water. One witness thought that 14½ cents was a fair price, and another that 15½ cents was a fair price for dredging and dumping in deep water. Colonel Heuer thought 14.48 cents was a fair price, and while there was a concensus of opinion that it would cost more to dredge and dump under the new specifications at the points named than to dredge and dump in deep water, the witness who thought that 15½ cents was a fair price, thought that it would cost one cent more to dump at the points named, while another thought that the difference in cost would be four cents. It will be noted that not one of these witnesses was asked whether it would cost more to deposit behind the bulkheads built by Axman than to dump in deep water; nor was any bidder told in the specifications that Axman had built a bulkhead behind which the spoil could be dumped.

All of the above opinion evidence was received by the Court, over the objection of the defendants, the question of its admissibility being reserved.

At the end of the case the Court ruled out all of this evidence to which the question of admissibility had been reserved, and instructed the jury to render a verdict for the defendant (Tr. pp. 149-150).

Errors Assigned.

While by reason of the aforesaid rulings of the Court there are twenty errors assigned (Tr. pp. 167-175), they are, in reality, together with the reasons therefor, all included in the statement of the 19th, which is as follows:

> "The evidence excluded shows there was no material difference between the two contracts involved; that the work completed was the same improvement, and that

the only variation from the original contract was in a respect merely incidental to its main purpose and concerned the mere depositing of the debris resulting from the work. Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work."

ARGUMENT.

I.

The Contract and Specifications Excluded Did Not Tend to Prove the Issues.

Under the Axman contract (specifications paragraph 36), the "work to be done" by Axman is specifically described. It is to excavate a channel and to deposit the spoil as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point and to impound the material behind bulkheads to be built by him. Inasmuch as this bulkhead was built in part at least, it follows that the work left undone by Axman was the excavation of this channel and the deposit and impounding of the spoil behind the bulkhead.

Colonel Heuer, when he came to re-advertise the work notified bidders by paragraph 36 of the new specifications, that the "work to be done" was one of two things: To excavate a channel and *either* to deposit the spoil as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point and to impound the material behind a bulkhead to be built and maintained by the new contractor, *or* to deposit the spoil in water exceeding fifty feet in depth lying within the area bound by lines drawn from The Sisters to Point San Pablo, thence to Marin Island, and thence back to The Sisters, and he provided in this para-

graph that bids would be received for either place of deposit, but he specifically reserved the right to award the contract, *irrespective of price,* for such place of deposit as may be considered most *advantageous* to the United States. Notice was further given by paragraph 37 that approximately 165,000 cubic yards of the channel had been dredged.

When, therefore, Colonel Heuer contracted with the North American Dredging Company that it should dredge the channel and deposit the material at "The Sisters", he did so solely because this place of deposit was more advantageous not to the parties, but to the United States alone. In so contracting he abandoned the work left undone by Axman, and substituted for it work in no sense substantially the same, but materially different. It, therefore, follows that the work to be done under the new contract was not the work left undone under the old contract and that the new contract did not tend to prove the issues.

Nor did the evidence excluded tend to prove that the work was re-advertised. The terms of Axman's contract only became fixed when Colonel Heuer had designated the outlines of the channel and the line of the bulkhead. When this was done, his contract was to dredge a defined amount of material, build and maintain a bulkhead and deposit the material behind the bulkhead. For the dredging, depositing and building the bulkhead, he was to receive a fixed price. There necessarily entered into this price the cost of building and maintaining this bulkhead, as well as the cost of dredging and depositing the material. As the necessary bulkhead had been built, at least in part, it was not necessary for the new contractor to build a new bulkhead. So far as the bulkhead had been built, the work was completed. In re-advertising, however, Colonel Heuer, in the new specifications, does not call the bidders' attention to this fact, but re-advertises for bids requiring the building of a new bulkhead. It is, therefore, submitted that the work was not re-advertised.

The plaintiff has based its suit on the allegations that it re-advertised and did the work left undone by Axman, and it claims the alleged excess cost of doing that work. The only question, therefore, is, did it do the work left undone, and there is no room for the further question as to whether if it did something else these defendants were damaged, or as to whether the changes made were material or immaterial. As the work left undone by Axman was neither re-advertised nor re-let, it is submitted that the evidence in question was properly excluded under the pleadings, and that there can be no recovery.

II.

The Contract Fixed the Method of Proving Damages and the Evidence Excluded was not Admissible Under That Method.

It is contended by the plaintiff in error, using the language of its nineteenth assignment of error

> "that the evidence excluded shows that there was no material difference between the two contracts involved; that the work completed was the same improvement, and that the only variation from the original contract was in a respect merely incidental to its main purpose, and concerned the mere depositing of the debris resulting from the work."

In other words, the contention is that the evidence excluded shows that the main purpose of the Axman contract was the acquisition of a completed channel, and that the change in the method of acquiring the channel was an immaterial change; that it was immaterial whether the contractor dumped behind the bulkhead built by Axman two miles away or in deep water five miles away. This contention is made,

notwithstanding the further contention that the evidence shows that this change made a difference in cost of from one to four cents per cubic yard.

We deny, however, that the main purpose of the Axman contract was the acquisition of a completed channel and that the changes were immaterial.

On the contrary, the main purpose of the contract was not only the digging of the channel, but the disposition of the spoil in such a way that it would not interfere with navigation; it must have been this, otherwise the disposition of the spoil would have been left to the discretion of the contractor. (See testimony of Colonel Heuer, Tr. p. 147.) That the disposition of the spoil was a material provision of the contract and one of its main purposes is shown by the fact that Colonel Heuer would allow Axman neither to dump the material outside of the bulkhead and then lift it over, nor to use a suction dredger to spread it out over a large territory, from the fact that paragraph 38 provided that material deposited otherwise than as specified will not be paid for, from the fact that under paragraph 42 of the new specifications, a disposal of the spoil other than at The Sisters rendered the contract liable to be annulled, and lastly from the fact that the place of deposit was more important than the price to be paid, for Colonel Heuer reserved the right in re-letting the work, to award the contract *irrespective of price* for such place of deposit as may be considered most *advantageous* to the United States. It is, therefore, submitted that the change was a material one.

The test of the liability of the defendants, however, is not to be measured by the question as to whether or not the main purpose of the contract was the dredging of the channel. The test is whether or not the work done by the North American Dredging Company was the work which Axman had left undone.

U. S. vs. McMullen, 222 U. S. 460.

In that case a contract was let for dredging, the Government reserving the right to deposit the spoil either at the Government station or in deep water, it being contemplated that a part would be deposited at the station and a part in deep water. The first contractor defaulted and the work was re-let, but the same amount of dredging was not done until the second contract as was contemplated should be done by the first.

The first contractor and his surety defended on this ground.

This Court first pointed out that the amount of work to be done depended on the appropriation, and on page 472 laid down the principle as follows:

> "Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform."

Again it is contended by the plaintiff using the language of the 19th assignment of errors:

> "Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work."

Did the evidence excluded show this?

The attention of the expert witnesses who went on the stand was called solely to the new specifications, and their testimony was that it would cost more to do the work under those specifications within twenty-three months, if the dumping ground was behind a bulkhead to be built and maintained by the contractor between the points named, than if the dumping ground was at "The Sisters".

Axman testified that he could get behind the bulkhead only at high tide, and Colonel Heuer admits that it was only possible to get behind the bulkhead twelve hours out of the twenty-four. Under these circumstances, a shortening of the time for completing the work would necessarily increase the cost thereof. If it would have cost Axman at the time he

took the contract the same amount to dump at the points named two miles off as at "The Sisters" five miles off, yet when the new contractor was not only required to build a new bulkhead, but his time was shortened, it would make a difference in cost in favor of the five-mile spot over the two-mile spot. It is submitted that this evidence, therefore, did not show that the method of depositing the spoil under the second contract greatly reduced the cost of the work and was properly excluded.

If this evidence did show that the cost of the work was reduced that fact is a mere fortuitous incident herein for the re-letting was not on the basis of cost, but on the advantage of one dumping ground over the other.

Now if this evidence was admissible, the underlying principle on which it could be admitted was not that it showed that the work cost less, but that inasmuch as the work had been changed, the plaintiff was entitled to show the relative cost of the two works at the time of re-letting, in order to arrive at its damages. If such evidence is admissible, it would make no difference whether the witnesses had testified that it cost more to dump at The Sisters than at Point Pinole or that it cost less. If they had testified that it cost more, however, then the plaintiff would have had to go one step further and show how much more, so as to show its damage. If this evidence is admissible on behalf of the plaintiff, then Axman would have been entitled to show by experts the relative cost of doing the work in the two ways. If the case had gone to the jury under the evidence, then, as Axman testified that he offered to dump at The Sisters for 11.44 cents, it would have been within its province to say whether he should be mulcted to the extent of $65,000 more than the amount for which he had offered to do the work, as the jury might have found that 11.44 cents was a reasonable price.

The question, therefore, to be solved, is whether or not the parties intended that the damages, in case of annulment,

should turn on the question of expert testimony as to the relative cost of dumping at The Sisters and at Point Pinole, or should be solved by at least a substantial if not an actual doing of the work left undone. In arriving at their intention, it is necessary to consider the terms of the contract and to keep in mind that as this contract was drawn by the plaintiff in error, any ambiguity in its terms must be solved most strongly against it.

In the case of United States vs. O'Brien, 220 U. S. 321, this Court had before it the construction of a contract prepared by the plaintiff in error. In that case the contract was annulled under its terms because the contractor failed to prosecute the work faithfully and diligently. It was provided by that contract that the penalty for such failure was the forfeiture of the money due, or to become due under it, and the United States was given the right to do the work by contract. In a later paragraph of that contract, it was provided that in case of failure to complete the contract as specified and agreed upon, the sums due or to become due should be forfeited, and that the United States also should have the right to recover any excess in completing it.

The contract having been annulled for a failure to prosecute the work faithfully and diligently, the contention was made that the Government had the right to recover the excess cost. This Court held the Government to the terms of its contract, deciding that it was only entitled to retain the sums due or to become due, first, because the failure to prosecute was not a failure to complete under the later paragraph, and, secondly, because under the earlier paragraph the United States had not provided in plain terms that it was entitled to the excess cost.

Since that decision and evidently in order to overcome the difficulty met therein, the government has changed the form of its contracts, so that in this contract it is provided by paragraphs 4 and 5 that in case of a failure to begin on time

or to prosecute the work faithfully and diligently, or to complete within the contract time, the contract may be annulled; and while in the O'Brien case, a failure to prosecute the work faithfully and diligently was not made a breach of the contract, the Government in the present form of contract, makes such failure a breach by providing in paragraph 3 that Axman shall dredge at the rate of 100,000 cubic yards per month.

By the terms of paragraph 2 of the present form of contract, the decision of Colonel Heuer as to the quantity of the work done, is made final. The contract, however, does not leave to his judgment the question of what is a diligent performance, as was done in the O'Brien contract. Under the terms of paragraph 2, Colonel Heuer decides how much, in his opinion, has been done in any one month; his decision on this question is final, but if he decides that less than 100,000 cubic yards has been done, the contract itself provides (paragraph 3) that that is not a diligent performance, so that under the present form of contract the penalty is the same, whether the contractor fails to begin on time, whether he fails to complete on time or whether he fails to prosecute the work faithfully and diligently in so far as the rate of performance is concerned.

Now, by paragraph 4 of the present contract, if the contract is annulled because 100,000 cubic yards per month is not dredged, Colonel Heuer is given the right in the first place to retain the sums due Axman until the "final completion and acceptance of the work stipulated to be done". This can mean but one thing, and that is that the plaintiff in error could not abandon the completion of the work and retain the sums or a part thereof, as damages for non-completion, but it must, if it desires to obtain such damages, complete the work in order to ascertain it. This paragraph further provides that the plaintiff in error shall have the

right to recover from Axman the sums expended by Colonel Heuer "in completing the contract," in excess of the sums stipulated to be paid Axman, together with certain costs and expenses, and evidently in order to determine the excess, this paragraph authorizes Colonel Heuer "to secure the performance of the work by contract". In pursuance of this paragraph the Chief of Engineers directed Colonel Heuer to re-advertise the work and keep a careful account of any increased cost. Axman, therefore, agreed to pay this excess, and the bonding company guaranteed that he would do so. Now, the parties to the contract must be deemed to know the legal effect of these provisions of paragraph 4. If Colonel Heuer, instead of accepting the bid of the North American Dredging Company for dredging the channel and depositing the debris at The Sisters, had accepted the lowest bid of some other person to dredge the channel and deposit behind the bulkhead built by Axman, then Axman contracted that he would pay any excess cost. Such excess not only would have needed no evidence on the part of the plaintiff in error to support its reasonableness (U. S. vs. McMullen, 222 U. S. 460), but Axman would not have been permitted to show that it was not reasonable. (Baer vs. Sleicher, 163 Fed. 129.)

So that is it not perfectly plain that the parties intended, or rather we should say that Axman and his surety had the right to assume that the plaintiff intended that by the terms of paragraph 4, the damage should be determined by the doing at least substantially of the work left undone by Axman, and not by the doing of some other work coupled with speculative testimony as to relative cost.

We submit that it is, and that the new contract specifications and expert evidence were properly excluded.

III.

We would end this brief here, if it were not for a question which was raised by the plaintiff in error in the lower Court and which will probably be raised here. It is to this effect, if we properly undrestand it: The contract permitted a change in the dumping ground, while Axman was prosecuting the work, and this change could be made after annullment so as to bind the surety.

WE MUST, THEREFORE, TAKE UP THE QUESTION: DID THE CONTRACT PERMIT A CHANGE IN THE DUMPING GROUND UNLESS AXMAN AGREED TO IT, SO AS TO BIND THE SURETY? IF SO, COULD THE CHANGE BE MADE AFTER ANNULLMENT?

The right of the Government to make changes in its contract, so as to hold the surety has been before this Court in several cases.

In the McMullen case (222 U. S. 460) the contract before this Court was one for dredging a channel. The place of depositing the spoil was left entirely to the discretion of the engineer in charge and the amount of dredging was not fixed, the contract was annulled and the work re-let at an increased cost. The question before this Court was whether an extension of time granted the original contractor had released his surety. This Court held that there was no prohibition as to making changes so as to bind the surety, and that the question as to the right to make a change depended on the provisions of the contract construed in the light of the intention of the parties.

In the Freel case (186 U. S. 309), the contract provided that changes could be made in the plans and specifications for building a dry dock. This Court held that while certain changes could be made, the right did not contemplate the change of the site of the dry dock and that such a change released the surety.

There are only two provisions in the Axman contract dealing with changes. The first is paragraph 6 of the contract and the other is paragraph 58 of the specifications.

Paragraph 6 of the contract is as follows:

> "If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect it must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The meaning of this paragraph is evidently this:

No change can be made except by mutual agreement between Colonel Heuer and Axman. We say this, because while the Government reserves the right to make changes, Axman cannot be compelled to carry out the change, unless the cost is satisfactory to him, as there is no provision by which the cost is fixed. Before, however, such a mutually agreed change becomes binding at least on the Government, it must be reduced to writing, executed by the parties and approved by the Secretary of War. So that no change to which Axman did not agree would bind his surety.

Paragraph 58 of the specifications is as follows:

> "The right is reserved to make such minor changes in these specifications as may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into."

Now, it will be noted that the Government under the latter paragraph does not reserve the right to make changes in the specifications, but only the right to make minor changes, and even then only such changes as are necessary to carry out the intent of the contract. The intent is to dredge a channel, build a bulkhead and deposit the spoil behind it, and this provision of the specifications only authorizes such minor changes therein as will accomplish the dredging of the channel, the building of the bulkhead and the deposit of the spoil behind it. Even supposing, however, that the intent is simply to dredge a channel, the question then arises as to what is a minor change, the argument being, of course, that a change of the dumping ground is a minor change; but the question immediately occurs, "Why call it a minor change, when it comprises the most important part of the work outside of the actual dredging? Why put such a change on a par with a change in the provision as to furnishing stakes, buoys, piles, etc., under paragraph 53 of the specifications? If the change of the dumping ground is a minor change, then we submit that no change could be other than a minor one, and that, therefore, this paragraph of the specifications would receive the same construction as if the word minor had been omitted therefrom. Adopting the thought of this Court as expressed in the O'Brien case (220 U. S. 328), we submit that the contract as drawn by the plaintiff in error does not show technical accuracy enough to give this contention of the plaintiff in error any weight, and we submit that this paragraph of the specifications did not authorize a change of the dumping ground.

There is no room, however, for contending that the change with reference to the deposit of the spoil was immaterial, because the parties had expressly contracted that it should be material. This is made evident by the circumstance that paragraph 38 expressly provides that material deposited otherwise than as specified would not be paid for, and by para-

graph 42 of the new specifications that a disposal of the spoil other than at "The Sisters" rendered the contract liable to be annulled.

Paragraph 58 further provides, "No increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into"—that is, as provided in paragraph 6.

It therefore follows that no change, whether minor or otherwise, can be made so as to bind the surety, except by the mutual agreement of Colonel Heuer and Axman. Nor would such a change become operative until reduced to writing and approved by the Secretary of War. As Axman never agreed to the changes made at the price fixed, neither he nor his surety were bound by them. But beyond this, and even if the Government has absolute right to make changes, the change was not made under the contract, but outside of it. When Colonel Heuer annulled the contract he put an end to all its terms and provisions, except those applicable to his rights in case of default, those giving him the right to relet the contract and charge Axman with the loss.

He, therefore, put an end to his right to make changes in the work to be done.

It is, therefore, submitted that the changes made did not bind either Axman or his surety.

We have just received a copy of the brief of the plaintiff in error. Under the statement of the point at issue, the question which we have just discussed becomes immaterial, as the contention is not made.

Respectfully submitted,

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